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International Court of Justice

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OFFICIAL TRANSCRIPT OF THE INTERNATIONAL MILITARY TRIBUNAL IN THE MATTER OF THE UNITED STATES OF AMERICA, THE FRENCH REPUBLIC, THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, AND THE UNION OF SOVIET SOCIALIST REPUBLICS AGAINST HERMANN WILHELM GOERING ET AL, DEFENDANTS, SITTING AT NUREMBERG, GERMANY, ON 28 AUGUST 1946, 1000-1700,
LORD JUSTICE LAWRENCE PRESIDING

SIR DAVID MAXWELL-FYFE: My Lord, might I mention the letter from General Warlimont which we discussed yesterday in connection with Dr. Laternser's application to call Buerker. The prosecution had the opportunity of considering the letter and they are quite prepared to admit that the part of the letter which relates to Colonel Buerker; that is, division "A" of the letter contains what Colonel Buerker would say if he were called. We are quite prepared to make the admission or stipulation which your Lordship suggested yesterday. The other parts of the letter, "B" and "C" relate to a statement of General Warlimont himself and a statement of a Major Meier. Dr. Laternser has not made any application with regard to these parts and he is quite prepared that they should not be read. Dr. Laternser is prepared to agree with our suggestion that the first part relating to Colonel Buerker be treated as the evidence that Colonel Buerker would have given if he were called.

THE PRESIDENT: Then perhaps you will read paragraph "A" of the letter.

DR. LATERNSER: I shall read from a letter from General Warlimont: "Nurnberg, 23 August, 1946. To Attorney Dr. H. Laternser." Then I shall leave out part of it and I shall start with paragraph "A". "About ten to fourteen days ago, early in the morning, there appeared before me in the general office camp at Dachau, Colonel of the General Staff of the German Army, Buerker, who was also being detained there, and whom I had known for many years. He told me that he had learned through the radio news the evening before of the Russian accusation against the OKW of an alleged preparation for bacterial warfare. In this connection, he recollected an incident during his short activity as Chief of the Organization Department of the Wehrmacht.

Leading Staff, which he related to me more or less as follows: And now there is a direct quotation:

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"During the autumn of 1943, probably in late September, there appeared before me in my office three gentlemen unknown to me, one of whom belonged to the Army Senitation Inspection, the second supposedly belonged to the Research Office of the Army Ordnance, but I can no longer recall the name of the third nor to which office he was attached. They explained to me that in their opinion the research work for counter-attacking any bacterial warfare was not or was no longer adequate. Their mission which was exclusively limited to research for defense purposes would have to be extended. They were convinced that it was essential to exhaust every possibility even to the extent of a counter attack which would take place in any case. The gentlemen thanked me to have an interview with the Chief of the OKW, in fact, with Keitel in this connection. I had first taken over the position of the Chief of the Organization Department in the beginning of September 1943, after a preparatory training period of two months with my predecessor Colonel Muenz (who fell in the war) and up to then had not heard the slighest mention of this matter. When at the next conference with the Chief of the OKW I brought up the matter, he was extremely upset, angry. He ordered me in a unusually sharp term in more or less these words 'That has long ago been prohibited and there can be no question of such a thing'."

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THE PRESIDENT: Dr. Kubuschok.

DR. KUBUSCHOK: Mr. President, gentlemen of the Tribunal.

The proceedings which the Prosecution proposes to conduct against the organizations are in many respects a novum. For the first time there are organizations with millions of members before the judge of a criminal court for the first time a judgment is expected covering all of the civilian and military leaders of a State. This brings to light the importance as well as the complexity of proceedings of that kind. From this also arises the duty for the defense counsel of the individual organization to concern himself with all actual and legal problems of these proceedings in general.

The Prosecution bases its move on the hypothesis that according to general principles of law there exists a collective criminal responsibility and that in consequence a criminal condemnation of a community as such is also possible. If it attempts to justify this criterion of law by examples from penal laws of various civilized countries, it must thus be cleared up concerning this that all of the examples mentioned do not prove the criminal condemnation of the organizations as such but only the condemnation of the single individual because of his membership in an organization termed criminal. Nor could it be otherwise. Criminal responsibility can only be given for the individual only. Every criminal law proceeds from the concept of guilt, from the recognition of a criminal act as such and from the unswering formation of will to accomplish this set of factured elements. The faculty to recognize and to form a will, and with it the concept of guilt, as such is possible for a natural person only.

It is another question whether as a result developments of our age responsibility of the organization is established for the domain in which because of its very nature it is bound to violate the interests of the State. This is the domain of irregularity, not the domain of criminality rooted in ethics. Laws were created to prevent these irregularities, to punish the organizations as such because of their responsibility in the fields experiencing their pernicious influence by means which could effect the organizations as such. A punishment under administrative law and a

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fine because of violation of State interests by an organization is practic: ble and for the sake of expediency the laws of various countries have rul on it. These proceedings based on a merely objective establishment, independent from an examination of the question of guilt which is not possible.

Using this as a starting point, we must examine what must be the sig: ficance of the declaration which the Prosecution demanded.

This will result first of all in an establishment of facts, with historical valuable contents.

Moreover, establishing of the criminal character of the organization presents a retroactive boycott for the organization which in the meantime was legally and actually dissolved, beyond that it involves especially a prescription of all organization members. That declaration embraces them all and as its effect, using Mr. Justice Jackson's words, the "bad" elemen' are segregate from the"good" elements.

Finally, and that is the most decisive and at the same time the most critical import of that declaration : By virtue of the Control Council L No. 10 it creates a far-reaching establishment of guilt for the individua. member. At this time the Control Council Law No. 10 is as yet a skeleton law, so to speak. The provision of Article II d makes membership in organizations declared criminal by the Tribunal liable to punishment. Once the Tribunal has given such a verdict, thus the former gap in the criminal provision is accordingly filled out. The name of the convicted organizations then is, so to speak, admitted into the wording of the provision of the penal code. The criminal nature of the organization now vanishes as a characteristic of the elements of the fact. Therefore, there is no need for the individual perpetrator to be possessed by this characteristic of the organization. The criminal action now to be adjudicated by the Court of the Control Council Law arises from mere membership. Therefore, only the objective and subjective elements of the membership as such, are subject to adjuticatión by the Court. The individual member who in this trial is called to account faces a decision incidentally, already m which deprives him of all other subjective and objective pleas not concern

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with his membership as such. He can no longer plead that he was not inform as to the criminal goals of the organization, that he did not foster them, nor can the metives for his entry or continued membership in the organization be validated any more in connection with the question of his guilt.

The incidental establishment goes even further and affects the factual elements of Article II, figure 2 e of the Control Council Law, according to which the member of the organization adjudged criminal shares also in the responsibility for all the crimes which the condemned organization is charged to have committed.

As a matter of fact, the conviction of the organization practically constitutes a conviction of the individual member who belonged to the organization. The fiction of criminal responsibility of the organization thus brings about what no system for criminal procedure herotofore in existence has recognized : the guilt of the members is abstractly disassociated from them, to be transferred in toto to the organization, with the result that establishment of the guilt of the organization obviates the requirement for complete proof of the guilt of the individual member.

Pondering these consequences and the effect of prescription which will be the unavoidable effect of the declaration for all members, the definition of "criminal character" - used by the Court for the organizati because of the absence of provisions of law - can have but one result: the individual member will by force be included in the Court's argumentati ; the concept of the organization can be understood merely as the sum tota of individual members. This means that the proceedings against the individual members cannot be handled as what is abstractly termed an organization.From this recognition arises the difficulty of the present proceeding which, according to statementsmade by the Prosecution, are expected to facilitate the subsequent proceedings technically; but according to the generally adopted viewpoint for individual guilt of the perpetrator this merely means shifting of the deciding principles to a different Court. Nevertheless, that Court enjoys the advantage that because of its connecti with the proceddings against the 21 main defendants it will find it easier

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to get a complete picture of the actual basis questions. To shift basic decisions to a Court which of necessity must take a global view of all the historical events is in itself a wholesome thought. One should not fail however, to recognize the limits set for what is practically possible. If the Court had merely been given the task of determining historical events and of judging whether a group of members of the indicted organizations participated in them, this task could be solved with comparative ease. In this case, however, the Court is given the task of making a statement on the total aims and effect of an organization, a declaration which in the light of the foregoing must take into consideration the knowledge, will and action of each individual member of the organization. From this arises the difficulty for finding a basis for a judgment which answers the wording of the proposed motion.

Another general legal viewpoint cannot be omitted in order to arrive at the definition of the concept of "criminal organization".

With its pronouncement of prescription already inherent in the conviction in this trial, and by reason of the decisions incidentally made - which is to be valid for the subsequent proceedings - the member of the organization is embraced membership is the thing for which he is outlawed and for which he is to be punished. The law which established criminality retroactively, arising from membership in the organizations under discussi is undoubtedly a new law. The legal aspect of the retroactive law has already been dealt with in the trial against the 21 individual defendants. The Prosecution then declared that in the application of a retroactive law there isjustification for comprising actions of which the perpetrator at the time of committing them knew that they constitute an infraction of the general moral and ethical standards or the world order. However, the case is different when it comes toindictment of the organizations. The judgment is now concerned not with the fact that an individual perpetrator committed a criminal act regardless of his awaren of its general condemnation although at the time of commission a law agai it didnot exist, but the point now to be decided is whether a person

incriminates himself by reason of membership in an organization. Assuming that theorganization in question actually had and carried out aims which were contrary to the general law of ethics or to world order, this does not of itself establish for the member of the organization the recognition of guilt through becoming a member or continuing to be a member. An organization can be criminal; its activities can be criminal and nevertheless the individual member who joins or remains - even though he may have knowledge of it need not under all circumstances take upon himself the burden of guilt resting upon those who set the criminal goals and who were active in carrying them out. This becomes particularly evident in the case of an organization whose purpose was originally legal and subsequently established for itself and pursued a goal partly or entirely illegal. A member which than continues to remain may do so because of a variety of motives, not necessarily immoral. It is quite conceivable that such a member resolves to remain in the organization because he believes that in so doing he may be able to influence the execution of the illegal goals, either in the hope of preventing them totally or partly, or at least to attenuate them. As fegards the criminality with which he is charged, such a member is not aware of a criminal or even a moral wrong arising from the mere fact of membership in the organization.
He can judge his membership in the organization merely in the light of the law which was in force at the time his action was committed.
This can only be the law of his own country. A member can be incriminated only on the basis of what the laws and legislation of his country have established in terms of criminal responsibility arising from membership in organizations. I therefore must confine myself to discussion of that which so far formed part of the abstract knowledge of a German national about the law and verdicts in connection with that question.

Very few German penal laws have concerned themselves with criminal membership in an organization. In his speech of 28 February 1946, Mr. Justice Jackson discussed these laws. All these laws always govern only individual trials of a member.

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The established opinion of German jurisprudence and adjudication of paragraphs 128 and 129 of the penal code and other similar provisions of law dealing with the question of membership provide that formal membership is not sufficient to establish the facts involved in a case of criminal law but rather a continued activity for the illegimate purpose of the organization. The member must prove his membership through his deed, and he must consciously advance the prohibited purposes through his actions. It is not deemed sufficient that the member who has knowledge of the illegimate aims of the organization outwardly displays them thus expressing outwardly his approval of the purposes endorsed by his membership but he must participate in the carrying through its goals through his own activity in the organization. Therefore, according to German law, it is immaterial whether by outward appearances his membership can be construed that he approves of the goals of the organization and that he thus supposedly enhances the reputation of an organization before the world in any measure whatsoever. Thus it eliminates all cases where proof of the knowledge of criminal goals or even active participation by the member in the execution of these goals has not been obtained; but going further it particularly eliminates cases in which the member disapproved of the goals and did all in his power to prevent execution of the goals or in any case tried to attenuate them.

A member of an association could therefore, in case he had morally unobjectionable reasons to enter or leave an association, rely on this abstract German legal principle. A retroactive law which make simple membership punishable can therefore in no case find its justification sought by the Prosecution in the case of individual defendants. We here have no infraction against a general legal disposition or general moral principles which makes one conscious of the illegality of one's conduct. Such a violation is, insofar, as only the reasons for entering or remaining are not morally objectionable, not established.

In order to establish the concept of "criminal organization" underlying its judgment - the Court must take into consideration the knowledge

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and activity of the individual members. It must be established thatthrough his membership in the organization the member approved of its criminal purpose and actually advanced it through his own activity.

In defining criminal concept it will have to be assumed that all crimes of Paragraph 6 of the Charter concern forbidden war, that especially the crimes against humanity, Paragraph 60 must be connected with the planning or execution of such a war.

In conclusion, I should therefore like to establish the following. An organization can be declared criminal only if all of the individual members conceived a common plan for an outlawed war, or if they joined in a war from which the crimes of the Charter would arise as anticipated by the planners. The individual members not only must have joined the organization with such knowledge but they also must have consciously advanced these purposes by participation.

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I do not ignore that the Tribunal faces a very difficult task on account of this legal argumentation. In my deduction I started from the Prosecution's concept that the proposed statement comprises also the question of guilt of the individual member, and that in later proceedings this member can restrict himself merely to the objections which refer to the fact of the membership itself. An absolutely necessary sequence of this concept is that the Tribunal has to restrict its decision to the number of cases of the individual members, in order to avoid that the decision issued now, contains already also the verdict of guilt of all individual members without an individual examination of the question of guilt having been carried through for each individual, and consequently to avoid also that the innocent in fact are declared accomplices indiscriminately, without having been heard. In order to avoid this the only means would be that a modified verdict would merely establish objective historic events without thereby at the same time taking a decision as to the individual member and his subjective guilt. It is clear to me that such a modification would face legal scruples with regard to the law of the Control Commission. We can approve of such a solution only if the Court can eliminate these scruples and actually secure thereby that in later proceedings the case of the individual member is examined to the extent which I have mentioned. If one starts from the presumption that the organization finally represents the bulk of the individual members, it leads to the conclusion that the shaping of its purpose presupposes a general training of the will of all members. Without the totality of the members, a change in the purpose of an existing organization cannot be realized. All members must at least know the new aim and must be determined to sponsor it. Should otherwise, of this new aim be a criminal one, the previous legal organization would be split into two, one with legal tendency and another with a criminal one. It would then be impossible for the entire organization to be a criminal one.

Furthermore the question to be examined as to whether it is sufficient for the definition of a criminal character of an organization, that a further criminal purpose is added to a hitherto legal one. Here also the previous conclusion should be considered that the definition "criminal" must comprise the total aim of the organization as a body. Should the criminal purpose be only a part of the aim and should it be sufficient for the purpose of declaring the whole of the organization a criminal one, the legal aim would be at the same time discredited by this general definition. Must not these acts then, which were committed for the purpose of the fulfilment of the legal aims be illegal ones as acts of an entirely criminal association? In respect to the case of the Reich Cabinet it seems impossible to me to declare this institution as such, is indubitable criminal, if at the same time there can be no doubt that at least the legal acts were valid. This legislation of the Reich Cabinet since 30 January 1933, which comprises all State administrations, has still today its predominent legal force. It would be an absurdity to consider these legistative acts as valid, if the aim of the Cabinet was an unrestricted criminal one. A voluntariness which must not only be present at the joining of the organization but particularly at the changing of the original aim, also when remaining in the organization. It must therefore be actually examined just as must be the spontaneous remaining in the Cabinet was always guaranteed or whether the legal and real conditions have abolished them at least from a certain date onwards. Finally the question to be examined as to whether there existed a permanent cohesive connection between the persons who are charged as members of the Reich Cabinet. Such a connection only would justify the consideration of any acts, the Reich Cabinet is charged with to have been committed by the community. This problem is already evident, because the Prosecution, which also, from its own point of view, considers a cohesive collaboration of the members of the organizations that has legally obtained the right to take part in the Cabinet sessions together with the body designated as Reich Cabinet, as necessary.

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As these Cabinet sessions were discontinued in the course of time, it remains to be examined whether afterwards, in their stead, the members were bound in the same way by any other tie during the performance of the activity under consideration by the Prosecution. Starting from these general considerations dealing with the organizational problem as such, and the special problem of the case of the Reich Cabinet, the result of the evidence must not be examined in order to establish whether the requirement for a sentence exist as argued.

First, I wish to turn to the personal limitation of the majority of the defendants. The Prosecution starts from the right to participate in the Cabinet sessions. They thereby suppose that the criminal activity assumed by them took place within the framework of the personal connection guaranteed by the sessions. They thereby overlook, however, that a number of persons mentioned by them in appendixes A and B of the Trial-Brief, were merely entitled to participate in those deliberations of the Cabinet sessions which concerned their administrative sphere. If the Prosecution obviously aims at collecting the decisions of all the participants, particularly in question of general politics, those members who had the right to attend the conferences only occasionally and in part, must, as a matter of course, be excepted from the community in question. I therefore refer to appendixes A and B where the Prosecution stated the extent of their right of participation for each of the persons mentioned by them.

With reference to appendix B, I should like to state that the Commanders-in-Chief of the Wehrmacht branches, that is, Fritzsch, Brauchitsch, Raeder, and Doenitz, were only entitled to participate in cabinet meetings on the basis of the Fuehrer directive of November 25, 1938, that is to say, not generally. With reference to the question of law in the case of Keitel, I refer to Doctor Nelte's plea. Also Shirach had only the right to participate when his sphere of activities was involved. Appendix B shows this fact correctly in the case of Axmann; it has however, been overlooked in the case of Shirach. In this respect, therefore, we have to supplement the list in appendix B with reference to Fritzsch, Brauchitsch, Raeder, Doenitz, Keitel, and Shirach.

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From the above conclusions, I believe that Reich Commissioner Gerecke's right of participation was also restricted. Moreover, this case seems equally worthy of mention because Gerecke had already resigned in April, 1933.

In the connection, these most also be mentioned who had indeed a right of participation in the Cabinet sessions but had no right of voting and were only present for information. This is the case of Chief of the Press Dietrich and State Minister Meissner.

The question of the volutary status of membership to the Reich Government cannot be answered uniformly. For the question of voluntary entry into the Government, these cases will have to be particularly considered, in which State Secretaries who previously did not belong to the circle of the persons included by the Prosecution were, through the resignations of their superior Ministers, immediately charged with the conduct of ministerial affairs and thus entitled to participation in the Cabinet sessions. These have to a certain extent become organized in their official career in their new posts.

The question of a member's permanence in the Cabinet is for the moment to be judged differently. Legally, the following must be borne in mind in this respect, According to Article 11 of the Reich Minister Act of 27 March 1930, the Reichsminister could request their discharge at any moment. An alteration of the legal position could already have occurred in virtue of the Ministers Allegiance Act of 17 October 1934, which is document No. 22. According to this, the Ministers were to answer fidelity and obedience to Hitler. A breach of fidelity and obedience could be assumed from a letter of resignation and therefore considered legally inadmissible. The question can however actually remain undecided, the legal consequence deriving from the Ministers oath is in any case expressly and legally established by the German Civil Service Act of 26 January 1937 -- 2340 PS put into effect on the 1 July 1937. By this law, the Reich Minister Act of 27 March 1930 is cancelled. By its Article 161, it is now stipulated that the Reich Ministers can now be discharged by Hitler alone.

Legally, the resignation of a Cabinet member is therefore no longer

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possible since the 1 July 1937. It will be objected that cases neverthel ss exist where Cabinet members h ve obtained their discharge. The cases of Gorecke, Hugenberg, Papen, Schmitt and Eltz von Ruchenach which are anterior to this time must in this respect be excluded.

In the subsequent period, various Cabinet members have endeavoured to obtain their dismissal. They have mostly failed, as we have heard on many occasions in the depositions of the individual defendants. Many only succeeded in being discharged from their department but were vest all over again with a new title or a new function, whereby they subsequently fall under the category of the persons implicated by the Prosecution. Darre was relieved from his official functions and even expelled, but could not obtain his official dismissal as Minister. Schacht had for this reason been preparing to break with Hitler for a long time; State Minister Popitz was executed as participant in the plot of 20 July 1944.

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So we see that in spite of the legal situation, there was actually no possibility of a member of the Cabinet resigning against Hitler's will.

The Prosecution itself admits that next to the spontaneacity of membership, a cohesion cooperation of the members must be established so as to consider the Reich Cabinet as an organization or group with in the meaning of the Charter. It means that this cohesion association must be guaranteed by the Cabinet meetings and the circulating procedure. I shall show by the following, that a collective cooperation of the members of the Cabinet did not exist, that moreover in its development even an absolute division of the Cabinet resulted. According to the evidence it results that three factors which overlap, have brought about the splitting of any internal cohesion of the Cabinet. These are the three factors which follow:

1.) The carrying through of Hitler's undivided way, which increases more and more up to an absolute dictatorship.

2.) The establishment of upper and lower ranks among the Cabinet Ministers having equal rights within the Cabinet itself, through the authority to use orders of the General Plenipotentiary, Special Delegate etc.

3.) A carefully guarded secrecy, which closed to the individual Minister any view beyond his Department, and which accordingly precludes every possibility of a super-departmental coordination. In this relation it is necessary to consider the resulting development historically and to exhibit its principles. One could be inclined to assume with the Reich Cabinets until 1932 a "Cabinet solidarity". At that time Cabinet meetings were continuously taking place, where all bills and also differences of opinion on questions which affected the sphere of several ministers were submitted for consideration and decision. Majority of votes settled the decision. And, nevertheless, already for the situation of practice and science of that period, a collective responsibility of Ministers was rejected. In the authoritative "Book of reference of German Constitutional Law" (Handbuch des deutschen Staatsrechts) by Anschuetz and Thoma, well-known lecturer on Constitutional Law, Freiherr Marschall von Biberstein wrote in 1930 on page 529: "General principles throw a most doubtful light upon the affirmation of collective responsibility formajority decisions, as, altogether, in jurisprudence the

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point of responsibility can only be in regard to rational beings. A firm State practice in the sense of such an affirmation cannot be proved for the Reich; on the contrary: The competent ministers make themselves personally responsible/... Above all, German political practice does not know the principle of "Cabinet Solidarity" as it is acknowledge abroad, above all in England, with the consequence of a collective guarantee for all individual actions..."

This negatism of a collective guarantee is valid not only for the responsibility of minister to the Reichstag, but also in the proceedings before the State Tribunal, where the ministers could be indicted and sentenced for their activity - largely patterned after the English impeachment.

Moreover, at that time already a restriction was placed on the making of decisions by the Cabinet and thus on the free decisions of the ministers: in the right of the Reich Chancellor to determine policy, for which he then bore the sole responsibility.

There were no discussions and conferences on these orders of the Reich Chancellor; they were binding for the ministers. Biberstein wrote about this in his thesis, page 528: "Otherwise, in the encroachments which ... his (the minister's) free decision endured, through the inviolability of the Chancellor's directives. Since it was his duty to conform therewith, he stood in a position similar to that of a subordinate in the hierarchy of authorities in regard to the decrees of a superior: the individual test of the compliance with duty of his conduct was thus ... taken away from him, and, as far as this was in effect, his sole responsibility was, whether he had acted according to orders, and not whether he had acted correctly. For that, the responsibility was shifted to the one giving the orders."

This was also true of proceedings before the State Court, the German impeachment.

We therefore have to realize already for the period of a purely democratic German form of state and practise of state that "Cabinet solidarity" did not exist, in spite of regular Cabinet meetings, and that the Ministers certainly did not work in cohesive cooperation when the Reich Chancellor in the Cabinet meeting utilized his right to determine policy.

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For the period prior to the establishment of the Hitler-government, it will further have to be considered that the government authority had slowly devolved upon the person of the Reich President on the basis of the application of the law concerning emergency regulation. Already at that time we see the formal factor of legislation, the Reichstag, only legislatively active to a diminishingly little extent; the decisive laws are being issued through the law concerning emergency regulation of the Reich President. The ministers, therefore, are still only advisors of the Reich President. It is a symptom of this development, that the Papen Cabinet had already purposely been established by Hindenburg as a Presidial Cabinet, that this Cabinet was composed of people in whom Hindenburg confidedn, which the latter had appointed as special ministers (Fachminister). The position of the Reich Chancellor, therefore, was considerably raised in importance, because neither the ministers nor the Reich Chancellor had been appointed as exponents of the parties, and as the result of this confronted the parties more independently, than was the case previously. The Reich Chancellor was the liaison man of the Cabinet with the Reich President. It was this position in particular which gave him a clear superiority over the other ministers.

It is in this situation that Hitler becomes Reich Chancellor. His Cabinet also, in its early stages, is again a Presidial Cabinet, which depends on the confidence of the Reich President and the latter's law concerning emergency regulation. Until the decreeing of the enabling act (Ermachtigungsgesetz) of 24 March 1933, all laws were issued by way of emergency orders (Notverordnung) and therefore were subject to the responsibility of the Reich President.

The Enabling Act (Ermaechtigungsgesetz) formed the decisive factor for further development. The legislative powers were now transferred to the Reich Cabinet. These were not directed to Hitler personally but to the Reich Cabinet. I do not claim that the Reichstag of that time already regarded Hitler as the Reich Cabinet. But doubtless the Reichstag was influenced by Emergency Decrees which constituted the government policy for a long time. Therefore this new emergency legislation of the Reichstag intended only to legalize this state for a future emergency. Thus the authorities adjusted themselves to a Reich Cabinet of such inner structure, kind and method of work, as it was formed during the time of the President's Cabinet. Certainly

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the sole responsibility was not transferred to Hitler which was assumed by the Reich President when the Emergency Decree was proclaimed. But to a certain extent he filled the gap which had now opened by the elimination of the Reich President. Outwardly this became apparent inasmuch as his - (the Reich President's) - right to issue laws was transferred to him. To this was added his right as Chancellor to determine the basic guiding principles of the policy. Both factors together resulted doubtlessly in a considerable strengthening of Hitler's power position in the Cabinet over his Ministers. The seed for his later autocracy had been planted.

In The Cabinet's working method, this was not at first clearly manifest. True, a decision is no longer reached but objections by the Ministers are taken into consideration which lead, in individual cases, to the withdrawal of radical legal drafts or to their modevation. Nevertheless, the Reich Chancellor's right to set the principles of political directives is already more manifest. Hitler lays claim to this right for himself and points out the responsibility that is entrusted to him alone. More important, however, than this development within the Cabinet are the influences introduced from the outside. The Party sets to work and runs everything that the Government purposely does not take hold of. The boycott against the Jews and the destruction of the trade unions are measures taken by the Party. The ideas of the Party take hold of the masses. The latter carries out what the Party is prone to refer to with the slogan: "Revolution". The witness Gisevius has summarized this development in his book, pages 141 to 143, in these terms: "It is not individuals that rush to National Socialism, no, the masses as masses get into movement. Because nobody wants to lag behind the events, all strive together to precede the revolutionary development by the length of half a nose. It is only from these versatile impulses, from these irrational movements of the soul of the masses that the whole political coordination can be understood which takes place in this early summer of 1933 with a sudden intensity really but still voluntarily and spontaneously anyhow ..... As masses, they create a new volition, force a new movement."

This movement also affected the old political parties. They dissolved

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themselves voluntarily. Moreover, they also make the vow to Hitler that their former members will loyally collaborate with the National Socialist State; they would summon their former members to do so. The Bavarian People's Party cleared the way "for every former member of their party to collaborate in the construction of the new Germany under Adolf Hitler's direct leadership." The Catholic Party (Zentrumspartei) by its dissolution enabled its supporters to put their abilities and experience unreservedly at the disposal of the national front under the leadership of the Reich Chancellor for positive collaboration in the sense of the consolidation of our national, social, economic and cultural relations and for the collaboration on the reconstruction of a legal state order." Even the Social Democratic Party partly followed when the Provincial committee of the Social Democratic Party of Wuerttemberg suggested to the holders of mandates "to carry on their activity in a sense which leaves no doubt as to their national conviction nor of their good will to support Germany's new political structure according to the plans of the national revolution." The attitude of the masses, similarly influenced, is reflected in the result of the Reichstag election of 12 November 1933 in which over 90% of the voters voted for the NSDAP. I am aware of the fact that the correctness of these election results are called into doubts. Whatever may have happened in regard to influencing and falsifying the election, one thing cannot have been doubtful for any objective observer of the then prevailing conditions: that the result of such manipulations can hardly have been of such importance that it could by itself have created an overwhelming majority. It cannot be denied that under the then prevailing circumstances the majority of the voters, hoping to bring about a change of the existing difficult situation, put their trust in the party in which they believed they already saw the partial success of its economic measures. If one considers how the concept of the party then had carried the day with the masses and that the idea of the party culminated in the personality of Adolf Hitler, that kind of voting and public opinion was the confirmation of the leadership idea in itself. The vote was a carte blanche for the supreme party leader of the Cabinet, the Reich Chancellor.

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By this development Hitler's claim to power was strengthened on the one hand and, on the other hand, most of the Cabinet members did not consider themselves able to prevent such a development. These reflections may also have been influenced by the idea that they could not effectively oppose Hitler's seizure of power. One restricted oneself, therefore, fundamentally to avoid a radical development and, as far as possible, mitigate the severity resulting from the changes made externally by the State apparatus. Thus we see the legislation clear up a situation, created from without, giving it legally a more moderate orderly form. If, accordingly, one reproaches the members of the Cabinet for modering illegal conditions and at the same time giving them a legal basis, such reproaches are to be directed to a greater extent against the men from the middle-class camp in the Cabinet. They who according to the intentions at the

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formation of the Reich Cabinet were appointed to restrict the National Socialist influence, and had subsequently not opposed the disastrous development by all means. They should have warned and opposed the influenced irrational masses and finally should have resigned from office under alarming protest. It is superfluous to examine the question whether the attitude of these men politically right or not, whether they were weak men who believed perhaps that they could thus avoid hopeless resistance. From the criminal consideration of the things the only essential point of view is whether it was descernible at that time that the development was a preparation for what happened later and accused by the Charter. If, with the formation of the Cabinet the outbreak of a real revolution, a civil war was avoided, they were entitled to believe that they have thus made at least partial sacrifices to the general mood in order to avoid a dangerous reaction of the incited masses. Rationally speaking, the hope could still exist that the development would find it in the framework of its legal limitations. Politically, this was doubtless a wrong idea. The radical tendencies of those who later kept pushing everything to extremes were underestimated. It should, however, to be considered that the very Cabinet members who came from the middle-classes, could not rid themselves of the idea that in the practical sense of a responsible leader of the State the limit of the development will be found.

These ministers who did not agree with this course tried to halt the development with diminishing success. Its attempts grew the more unsuccessful when the authority of the Reich President, the weight of the bourgeois conservatives and also the position of the Reichswehr ceased to form a counter-balance. Hitler understood how to use Hindenburg for his own purpose. The burgeois conservatives did not form a closed united front anymore, large parts divided and went over to the National Socialists. The parties dissolved themselves, and their followers were now robbed of their cohesion. Blomberg became a follower of Hitler. The Ministers under consideration therefore did not have any support from the other side. Toward them Hitler expounded his appointment by the people and his sole responsibility toward the people. An open protest practically proved itself as impossible. The pub-

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lication of the Marburg speech of Papen was prohibited, his departure from the Cabinet as the result of this just served to make the circle of Ministers dissatisfied with the development only still smaller and thereby less influential. Every Minister who considered the question of his resignation had to count on the fact that his position would be occupied by a new man, who did not hinder, but only furthered this development. A Minister who was really soldily with his Department did not like the idea of transferring his field of work into such new hands. It is clear that those who were confronted by this question did not want to endanger that which they had achieved by hard labor hindering and correcting in their fields of work in the execution of the laws, in the personnel policy and also in other respects, and that they wanted to continue their work in this sense in the future also.

The Head-of-the-State Law of 1 August 1934 is the legal summary and the final mark under the previous development. The law is a Cabinet Law. Hitler demanded the consolidation of his office with that of the Reich President. According to his declaration this consolidation was not to be the final solution, only the momentary situation was to be considered, that he personally would not recognize a new Head-of-the-State over himself, and, on the other hand, however, he could not give up his office as Reich Chancellor. He pointed out that a decision of thepeople, which was to be demanded after the death of Hindenburg, would bring the sanctioning of this measure. In this state of affairs the Cabinet did not consider itselt able to oppose the demand of Hitler. The results of the public voting were clear from the very beginning. Hitler would have achieved his aim to decree the law under all circumstances, even with the refusal of the Cabinet. The Cabinet Law of 1 August, 1934, therefore practically represents nothing else but a prepared law, which in any case could be achieved and was also achieved through public voting. The legal sanctioning of the dictatorship, therefore, was only a confirmation of the previous relationships of power and a consequence of the overwhelming will of the people which existed at that time.

With this law, a clear situation had been established, not only power -- politically but also with regard to state law. The law represents the complete

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accomplishment of the monocratic principle on the state sector. Hitler consolidated the right of theReich President in his person, especially the law emergency regulations (Notverordnungsrecht) with the rights of the Reich Chancellor, to decide the fundamental lines of policy. As Supreme Commander of the Armed Forces he finally received the strongest factor of power in the state into his hands. With this, therefore, practically every state agency became dependent on his will and had to follow his directions. The Reich Cabinet also is no exception from this. Outwardly this becomes wtill especially apparent through the law concerning the oath of the Reich Ministers of 16 October 1934. The new oath for the Ministers corresponds to the general oath of the officials and soldiers, and shows that the position of the Minister has changed to that of a top state official bound to directives.

Corresponding to this legal situation, the working procedure of the Cabinet and the importance of the Cabinet Sessions also undergo a change. Insofar as foreign political decisions were concerned, Hitler announced his decisions, mostly in one long monologue on the general political situation. Later on he only informed the Cabined of the accomplished facts. He informed the Cabinet of the occupation of the Rhineland after the troops had already entered it. In the case of fundamental domestic, political measures, for example the Nuernberg Laws, the Cabinet as such was not previously consulted. The majority of the Ministers were surprised when the law was suggested in the Reichstag Session of the Nuernberg Party Day. In the drafting of minor laws of administrative importance only the completed draft and the reasons for it were stated. In order to avoid the expression of departmental misgivings in the Cabinet Session, the drafts were previously made "ripe for the Cabinet" in accordance with a directive of Hitler, i.e. the specialist Ministers were given the opportunity in a preliminary discussion to voice their departmental misgivings to the departmental Minister responsible for the initial draft. Only after these misgivings were allayed did the draft reach the Cabinet Session. Therefore, no allowance was made for a consultation in the Cabinet Session. General, political considerations, therefore, which were affected by these drafts.

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were subject to the sole decision of Hitler. If, therefore, a general politica question did arise, in which Hitler's point of view was not known, then the departmental discussion was postponed until his directive had been obtained. By this the Cabinet sessions did not only lose every political significance, but also a practical purpose. Hitler therefore convoked the Cabinet only in constantly growing intervals, until finally after a last session in February 1938 which was merely destined to receive a s tatement by Hitler, no Cabinet sessi ns whatsoever were held any more.

Henceforth the Cabinet sessions were replaced exclusively by the circulation proceedings. The acting minister submitted the drafts of bills to the other members of the Cabinet to enable them to raise objections in their own fields. It stands to reason that these political basic questions and political measures which Hitler decided as he saw fit never were subject to the circulation proceedings. As is shown by the presentation of evidence, most of the ministers were informed of the important political events in no other way than any other person. In most cases they learnt of the facts afterwards by press or radio, unless occasionally something leaked through to them through secret channels prohibited for them, too. These may have been more numerous in the sphere of the minister than elsewhere. These occasional information, however, could not afford a comprehensive and authenticated total picture of the actual situation. Only the few direct confidants of Hitler were really comprehensively and authentically made acquainted with the events. This granting of confidence, however, had no connection with the persons in question being invested with the office of a minister of state. The overwhelming majority of the ministers who did not belong to this closest circle learned for example of the march into Austria, the setting up of a Protectorate and the starting of the individual war measures only after the measures had become effective and had been publicized.

The circulation proceedings did not represent any personal cohesion among the ministers. Even though, as a rule, the drafts were submitted as a rule to all ministers, -- this was not always done as shown by Schacht's evidence --

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this did not mean a joint collaboration elaboration of all the ministers. This was only done to enable each minister to examine whether the interests of his administrative department might be affected by the draft. The individual minister thereby was more strictly limited to his particular department. It was his only task to submit the objections of his department and to see to it that this department was not harmed nor its competence infringed. The interests of the department are special interests and the restriction to them excludes general aims and purposes.

The form and the planned limitation of the contents of the circulation proceedings had to and were thought to avoid a close cooperation of the ministers as can be concluded from all evidence.

In the last phase of the development this intention of Hitler clearly and openly becomes also evident. The taking of evidence has shown that his ministers, were not allowed to reach him and that all efforts of the ministers to this end were in vain.

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Various ministers attempted to institute Cabinet session again in order to provide thereby opportunities for expressions and information. Hitler refused this with the remark that he wanted to have nothing more to do with this defeatists' club. He even forbade a personal reunion of the Ministers arranged by Lammers in the form of an evening beer party.

Should the Prosecution assume that the assembly of the Cabinet members held the authoritative conduct of the State in their hands and will fully directed its whole policy towards a contemplated, reprehensible war, then this is contradicted by the fact of the disintegration of the Cabinet as a cohesive whole and the evolving of a single directing head in the person of Hitler. But further proof that there was no functional cohesion between the Ministers can be furnished by other facts. Between Hitler's directives and their execution by the departments of the individual ministers, superior offices were created which, in their turn, had authority to issue directives to each individual Minister. The departmental Minister is therefore further removed from the headquarters of the decisive authority; he is, furthermore, the executive agent of two successive directive headquarters. The "Commissio for the Four-Year-Plan", the "Minister-Councillor for National Defense", the "General Plenipotentiary for Labor Assignment" and similar institutions were created by Hitler himself and provided with full legislative powers by him personally. It is even possible for most of these headquarters not on to compel the departmental Minister to issue specific administrative directives and ordinances, but what is more, they could issue these themselves and, disregarding the Ministers, have recourse directly, to the latters' subordinate offices. This dismemberment was obviously brought about by Hitler intentionally. The Cabinet as an agency for the execution of his legislative proved too extensive, too complicated and too obstructive, and the position of the Minister still too independant. Therefore, he delegated legislative power to isolated or minor groups who, as men enjoying his special trust, ensure the prompt execution of his wishes. By the creation of these new subordination positions, he restricts the power of the department. Due to the confusion of the manifold relations of subordination and authority, the difficulty of defining competences and authorities, Hitler's orders are

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the ultimate issue, the sole reliable directive. His directives subsequently became indispensable in most cases and the Ministers are referred to them. The picture given by the Prosecution of the efficacy of a closed community assembled in Cabinet sessions is thus considerably altered. An entirely new State system has been put in operation, an absolute single, supreme direction in the person of Hitler, and intermediary level introduced by Hitler and subordinate only to him, in the form of the newly created institutions discussed above, led by men who were not all members of the Reich Government as defined by the Prosecution, and, as executive agencies who in this organizational structure ultimately and naturally became restricte solely to their own field of work.

Finally, as a further factor preventing the Ministers from agreeing, the prohibition of absolute secrecy decreed by Hitler has to be considered. No Minister was to know more than was absolutely necessary for him to carry out the task specially assigned to him. Even proceedings in his own department could be kept secret from the Minister. I refer to the affidavit of Harmenin from which it appears that the preparations for the intended war with Russia were delegated to the State Secretary over the head of the Minister who was ordered to keep it secret from his Minister. It could not be made clearer that Hitler revealed his plans only to those to whom he entrusted their execution, independant of their position, and those whom he considered specially suitable for it.

All this which in a democratic government is considered as a general interest, concerning the entire Cabinet, is here shifted to a department and considered as their exclusive task. What in itself should be an affair of the Government is simply labelled an administrative task, which is then dealt with by simple administrative instructions. This discharge is made behind partition walls of the Department overwhich no other Minister has the right or opportunity to peer. As a special example I refer to the treatment of concentration camps and the later so-called "final settlement of the Jewish question". By virtue of a special mandate issued by Hitler, Himmler handled this question as a pure administrative concern for which his department was competent. Also in this departmental affair the basic prohibition of secrecy

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was valid against the other Ministers. This development must be considered as opposed to the prosecution's opinion that the entire cabinet from the very beginning had worked with Hitler in planning the illegal war and its results and had carried on its execution. Under no circumstances could one establish the necessary close and confidential collaboration of a conspiracy being in accordance with the shown development. Hitler's endeavor in every way to curtail and control the Ministers' field of responsibility, his endeavor to replace the total responsibility of the cabinet by a leadership if the individual department, the establishment of super departmental control offices outside of the cabinet, his endeavor finally, to prevent also the personal contact between the ministers, coincides in no way with the thesis of the prosecution.

In fulfillment of the assignment of the defense it is yet necessary to examine the question if and when the circle of persons, circumscribed by the prosecution, can at all have conceived the decision for the planning and execution of the Charter crimes.

Various statements by the prosecution seem to indicate that it wishes to assume this to have taken place as early as 30 January 1933, the day the Cabinet was formed. It could logically be assumed that already the purpose of the founding of the Cabinet was criminal. To this question I only need to say little and essentially refer to the statement which I made in defense of the defendant von Papen. I would like to complete the reasons mentioned therein, by adding the statement which Bruening made in 1932 to the Minister Count Schwerin-Krosigk. I refer hereby to my affidavits Nos. 1 and 3. Bruening as the then responsible Chancellor of the Reich then already admitted the impossibility, owing to the continuance of the economic and political state of crisis, to govern permanently almost exclusively with the emergency powers of the Reich President. He declared that the agitation of the National-Socialists could be usefully fought only by obliging them to take responsibility. It is interesting that this responsible-minded statesman, confirmed at such an early date, that which half a year later, after the failure of all efforts to avoid this consequence, because a fact.

This political development arising from the necessity of the moment, furth-

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the constitutional necessity of forming government and the unhomogeneous composition of this entity must in any case exclude a criminal intention in th formation of the government. In addition I would still like to say, that negotiations with individual members of the Cabinet have only taken place on a very small scale, that a great number of members were taken over in the new Cabinet because of their former membership to the government, only by the desire of Reich President, von Hindenburg. To admit the existence of a criminal act in the foundation of the Cabinet would be opposed to the fact tha Hindenburg who constitutionally was responsible for the formation of the Cabin and as a matter of fact was very active in doing so, is not mentioned in the personal statement which the prosecution has given in Appendices A and B. As moreover deceased members were also mentioned by name and the circle of the Cabinet members was not outlined according to formal constitutional law but by practical view points, I believe I can deduce from this fact that as a result the Prosecution does not consider the foundation of the Reich Cabinet on the 30 of January 1933 to be a criminal act. The Prosecution believes at last in a common planning for the commitment of Crimes according to the Charter, alrea before the beginning of the Cabinet's activity, and believes to be able to draw an indication of the uniform establishing of the aim at an inpermitted war from the development of the legislative activity of the Cabinet. I will now leave the discussion of this pretended evidence and consider a particularl significant moment for this question.

It is the 5 November 1937, the day of the conferences between Hitler and his War Minister of the three Supreme Commanders of the Service and the foreig Minister, whereby he solemnly set forth his future plans. I need not enter i the problems started by the defense counsels of the defendants, whether Hitler developed a true picture of his plans in its full extent. One thing at least one can surely take from his declarations, that he first informed only a very limited Circle of his plans. If he solemnly confesses that he reveals his most secret plans to the personalities present, and that he purposely had omitted to inform the Cabinet as such -- as it was usual in the other countrie of such far-reaching decisions, it may be clear, that he had mentioned these things at first to his selected circle, and that he purposely avoided informin the remaining Cabinet members of his plans.

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In his consideration of the matter Hitler developed the necessity of an imminent war. He asserted that they had come to this conclusion in the course of his four years of rule and that this conclusion was the result of the experiences gained during this time; that the assurance of the validity of the nation could not be guaranteed by economic measures. Should we even be skeptical by the truthfulness of this declaration of Hitler, there is one thing certain: The uniform plan of a criminal war by himself and a part of these Cabinet members cannot have existed since 30 January 1933, as stated by the Prosecution, considering that he now on the 5 of November 1937 announces to a number of these Cabinet members that his resolution and with it the actual planning for the war was born in this very hour as the result of the observation of the facts during the four previous years. If Hitler hereby expressly points to the fact, that he excludes the remaining Cabinet members from this communications, it clearly results that he does not consider the Cabinet as such the appropriate circle to receive informations of this kind. It is herewith clearly proved that, at least until this date, no such common Cabinet plan existed, and could only have been created under the leadership of Hitler.

At what date after the 5 November 1937 could such a common plan have been decided on?

In the period after the 5 of November 1937 only one single Cabinet session took place, on 4 February 1938, in which Hitler made known to those present only the personnel changes at that time without making known the reasons for them, let alone, to develop any war plans then. If the Prosecution considers the members of the Cabinet as an associated band with the right to take part at the Cabinet Meetings, it must take the stand for the subsequent period that such a band did not exist any more. A certain substitute for the meetings of the Cabinet existed certainly in the now exclusively employed circulation proceedings. It is however to be considered here that the circulation proceedings

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were probably adoptable by themselves to pursue a previously existing collective purpose by separate acts in the legislation. It is however unthinkable that such common planning for such a comprehensive crime could be undertaken by this written circulation proceeding. The extended connection must consist in some way of such naturally necessary secret conclusion. In the sphereof a Cabinet Meeting this would be possible. In the sphere of a documentary debate in a circulation proceeding it appears impossible.

Above all these considerations it is moreover to be established that as a result of the entire evidence such a plan for the beginning of the forbidden war was never shared with the Cabinet, let alone discussed or even commonly planned.

Now I have still to discuss the supposition of the Prosecution that legislation activity of the Cabinet was to commence thus that they in their entirety had pursued the aim of the war of aggression. The Prosecution believes that with the legislation the aim was to gain for Hitler complete control and to consolidate it and prepare and carry through the war of aggression.

The prosecution is aware that neither the establishment of totalitarian control nor the individual decrees issued by the Cabinet violate the Charter. It, however, believes it is able to establish a relation between this totalitarian control, or the individual decrees and the crimes of the Charter by following construction: The plan was purposely designed from the first to meet the crimes against the Charter. In order to attain this aim and to avoid an opposition against the planning the totaliarian control of Germany was necessary. For the purpose of establish ing it, a number of decrees were issued by the Cabinet.

In part the laws showed this direct aim, in part they strove to promote this aim through their terroristic and inhuman character. The prosecution proceeds from the premise that dictatorship had been the necessary presupposition for the later crimes of the Charter and that the establishment of the dictatorship itself had been a part of the plan for the crimes of the Charter. Answer-

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ing this view it must be stated that it is impossible to draw conclusions from an effect as to its cause in order to prove by that conclusion that the cause by necessity had to lead to the effect. This view would be correct only if the establishment of the dictatorship could find its compelling motive in the planning of the crimes. The opinion is wrong if the establishment of the dictatorship could seem necessary for other reasons or even expedient. Such reasons existed. The call for unified power is a natural phenomenon in times of special crises. A unified power is able to take measures fast which are necessary for the elimination of conditions constituting a crisis. Always and everywhere, therefore, there existed a tendency towards unification in such times of crisis. This is probably provided for in the constitutional law of every country. Emergency measures then shift the power from a large body, such as parliament, to a smaller circle. We had this development in Germany already at a time when we could still be regarded as a country with a democratic government. This is proved by the emergency decree law which already at Bruening's time was applied to the largest extent. At an earlier point I have already pointed out that the thought of unification was further promoted through the Fuehrer concept pronounced in the Party. The people believed one could find the deeper cause for the economic crisis in the lack of unified leadership. It is true the German people had received the gift of purest democracy through the Weimar Constitution, but in its whole past it had not been educated to it. Lacking was the gradual, organic development towards free democratic thinking, the education to critical judgment. Therefore, it can be explained psychologically that when the democratic republic was in in great economic difficulties, the cause for it was not seen in the real given conditions, but was sought in the lack of unified leadership. Consequently, the idea of the Fuehrer principle and an exclusive direction of destiny in one hand was popular. It found its echo in the elections which in any case must be taken for a recognition of the principles of the NSDAP, and thereby of the Fuehrer idea. Neither can it

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be doubted that a rigid concentration on and orientation of all spheres towards the direction by a single superior authority had in some respect a favorable effect on the execution of the comprehensive economic measures which undoubtedly were indeed very daring.

THE PRESIDENT: Shall we break off now?

DR. KUBUSCHOK: Very well, sir.

(A recess was taken)

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DR. KUBUSCHOK: Before the recess I was saying that considerations of expediency could justify the establishment of a dictatorship. I continue. This recognition alone would already furnish the justification necessary within the framework of a consideration based on criminal law, for a co-operation of the cabinet members in the development leading to the dictatorship. In any case, the absolute conclusion made by the Prosecution would be excluded, namely that the aim at an aggressive war follows necessarily from the establishment of dictatorship.

That legislation of the Reich Cabinet, too, with which the Prosecution deals from the viewpoint of terroristic and suppressive measures, it (the Prosecution) sees aimed at a dictatorship established and consilidated for the purpose of an aggressive war. In doing so it considers particularly also the anti-Jewish legislation. This too, must be examined here only from the viewpoint off whether its purpose and contents can actually be regarded as aimed at an aggressive war. The Prosecution pointed out that Himmler stated in his Posen speech in 1942 he was happy to see the possibility of an internal danger through the Jews eliminated in this advanced phase of the war.

Such a statement can, if considered superficially, give cause to draw the conclusion that now actually all legislative and administrative measures against the Jews taken to a gradually increasing extent, were directed to this and welcomed by Himmler. Here, however, one will have to differentiate between what was imposed by means of legislation upon the Jews in the way of restrictions and what was carried out by Himmler's administration in the way of measures of quartering them in barracks and extermination. Only the latter measures, the removal of Jews from the physical association with the other population, their absolute confinement in Polish ghettos and concentration camps and finally their physical annihilation were what Himmler could consider making the conduct of the war easier. On the other hand, although the laws issued by the Reich Cabinet, also the Nurnberg laws passed by the Reichstag, undoubtedly constitute absolute measures of suppression. None of these laws provides for the hermetical separation of the Jews from any association with the rest of the population. The laws finally lead to an eclusion of the Jews from public positions and the industry to a personal restriction of their freedom which violated even the most elementary rights of the human individual. It can be recognized that their effects were aimed at rendering life

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for the Jews in Germany difficult in every respect. Parallel to this runs the generally propagated goal of getting Jews to emigrate.

I believe it is the latter viewpoint which shows that the persecution of the Jews insofar as it was carried out through legislation, did not have an aggressive war at its goal, not even indirectly through the consolidated dictatorship. One cannot set aggressive war as one's goal on the one hand and on the other hand create by legislative measures a situation which necessity drives to emigration the people robbed of the foundation for their existence. Should one want aggressive war, it would be more than folly to expel members from one's own body of people, thereby making them enemies and driving them into foreign countries, into countries which one must consider as the future enemies within the framework of war planning. Therefore, I believe that the entire anti-Jewish legislation can be eliminated as the consideration necessary here is limited to the crimes mentioned in the Charter. In order to complete the above statements I would like to add only that a great part of these laws was not passed as one may think in full agreement of all cabinet members; but the laws clearly show the signs of compromise, too, at which a part of the ministers knew how to moderate the total tendency of the law and to limit its effect, as I have already pointed out during the defense of the defendant von Papen. From the fact that a minister participated in such legislation it does not result that he agreed with the tendency of the law and approved it. In this connection I should like to refer to the statements made during cross-examination by the witness Schlegelberger concerning the letter addressed by the latter to Lammers. Schlegelberger states that some party agency, probably the Race Office of the SS, intended to remove all partly Jewish persons to the East. In this instance the Ministry of Justice had the possibility of stating its point of view on the occasion of a divorce question. His initial standpoint outlined in the letter addressed to Lammers, which merely consisted in a rejection of the contemplated measure remained without result. Thus, he felt obliged to moderate the measure by some practical proposal. That is the reason for his proposal, which takes up the prevention of raising mixed generations as desired by the Race Office and which contemplates to exempt all those mixed persons from whom no further offspring can be expected. In this connection, he also proposes that a mixed person be exempted from being sent to the East if he agrees to

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be sterilized. In considering such a proposal it is difficult to disregard human sentiments, and to approach its judgment with an objectivity required for a trial But, in this instance, one can only come to the conclusion that an attempt was made here, however barbaric, to avoid measures which would have been worse and would surely have to be expected. It is certainly a problem to determine how far somebody may participate in an evil order to prevent a still greater evil. In any case the motives must be considered here too. For the questions to be discussed in this present case, it is decisive that also the Schlegelberger proposal wished to avoid at least the geographic elimination of the mixed persons from the German population. In consideration of the points of view expressed by Himmler in his speech made in Posen, this alone is determining in the frame-work of contemplation of the war of aggression.

If I now turn to the further legislation, I do not have to consider it as far as it lies before June 30, 1934. I refer here to my statements made in the Papen case.

The law of 3 July 1934, by which the measures of June 30th were justified, is considered by the prosecution as the first obvious law of injustice, by which crimes were subsequently sanctioned. Here also one must first depart from the point that the measures of 30 June 1934 were in no relation with the planning of a war of aggression. What Roehm planned himself and to what extent he stood in relation with any Reichswehr agencies cannot be determined. In any case, the elimination of a man like Roehm and his followers cannot be considered as the elimination of a difficulty in the plans of a war of aggression. If beyond this, other Hitler opponents were killed, who certainly stood in no relation to Roehm, it is without doubt plain murder, but here, too, especially when considering the personalities concerned, one cannot see any connection to a war of aggression.

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The law itself, according to its contents, exempts from punishment only those who acted " in defeating aims of high treason and treason". Thus, the law does not cover those cases which concern persons outside of the "Roehm circle". Those were partly sentenced, and partly Hitler decreed their exemption from punishment by virtue of his right of abolition. In this connection I refer to the affidavits of Meissner and Schwerin-Krosigk, as well as to the statements of witness Schlegelberger. Most of the ministers knew that tension existed between Hitler and Roehm. The events themselves surprised them. The statements concerning the events which Hitler made at the cabinet session of 3 July 1943 were essentially the same as his declarations made at the Reichstag session of 13 July 1934. On the basis of this description the ministers were mostly of the opinion, that it was actually a question of enterprises of high treason and that the immediate defensive measures taken by Hitler were necessary in order to prevent a greater expansion of the revolt. Hitler admitted himself that excesses had occurred to a certain extent and that persons were involved who had nothing to do with the revolt. For those cases he promised a legal inquiry. If the law, in its wording, actually limited itself to the persons who participated in the revolt, then the ministers thought that they could answer for this law. One may have objections against this law, but one must not disregard the fact that the crushing of this revolt could appear as an event with which a state of constant disorder and acts of violence by the Roehm followers were done away with once and for all. Therefore, one cannot draw the conclusion from this law that thereby generally, also in the future, measures which were not justified by formal law, would be sanctioned afterwards and removed from the regular administration of justice. It seems possible that one advocates the view of wishing to do away legally and once and for all with such a complex of unrest, particularly if the guilt in the cases dealt with by law appeared to be evident. In any case, many believed at that time that

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they could see in such a legal treatment of the case that the principle of the obligation to prosecute political crimes was maintained.

Those laws have especially been singled out by the prosecutio which are connected with rearmament and for this reason alone are alleged to point to the plan of an aggressive war. In this connection the prosecution deals with the formation of a Reich Defens Council in April 1933 and the two secret Reich defense laws of 1935 and 1938.

In his testimony on the witness stand the defendant Keitel stated that as early as 1929 an interministerial working commissio had been formed dealing with questions of Reich defense. This commission was not in the least concerned with operative or strategic questions or with questions of armament or procurement of war material. On the contrary, it deliberated exclusively the measure which had to be taken in the civil sector if the Reich should be drawn into a conflict of war.

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Into this category came especially preparations for evacuation in case of war, an indubitably defensive measure.

There was no change in the technical work of the Commission when in April 1933 every Minister was obliged to send a specialist to the Commission, instead of the voluntary collaboration of individual specialists. It was only for this reason that the Ministers grouped together to form the Reich Defense Council. In this capacity a group never worked or had discussions, but rather, the work was done in the same manner as up to now by the Reich Defense Commission. A comprehensive view of the work it did can be found in the "Mobilization Book for Civilian Authorities", published in 1939, which contained a list of administrative measures to be taken by the civil authorities in case of mobilization. The contents of the book in no way show an aggressive tendency. The preparations that were made were obvious state security measures for the event of war. One cannot draw the conclusion that a war of aggression was being planned just because the work of the Commission was kept secret. It is only natural and a generally accepted fact that allmeasures, even those for the defense of a country, are not revealed to the public.

The work of the Reich Defense Commission went on continuously until the beginning of the war. It was not changed either when the unpublished Reich Defense decree of 21 May 1935 finally gave a legal basis to the Reich Defense Council, which had been founded in April 1933 through a closed cabinet decision.

This Reich Defense Council did not meet a single time, as the interrogation of Goering, Lammers, Schacht, Keitel and Neurath has shown. There was not a single conference, and the procedure of circulating questionnaires to consult members was also not used. The only activity consisted in the task of the Reich Defense Commission, which has already been discussed here. The Reich Defense Council itself was merely the head organization for the Commission.

Through the Reich Defense Law of the 21st of May 1935, the position of the Plenipotentiary for the War Economy was also created. He was given the right to secure economic sources for the event of a war already in times of peace, and to give directions in this field. Actually, Schacht, as

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Plenipotentiary for the War Economy, did not issue any measures in this, his appointed official position. In practice, these tasks already went over to the Commissioner for the Four Year Plan in 1936. Here again it has to be pointed out, that organizational and precautionary measures for the event of a war are a matter of course. They alone can by no means be considered proof for aggressive intentions. To take economic measures for the event of a war was an absolute necessity for Germany, due to its especially exposed economic and geographic position in the event of a war. One could not afford to make the organizational preparations after the outbreak of a war, since an uncontrolled German industry from the start would not have been able to survive in case of war.

In answer to the idea of a purely defensive preparation the prosecution stated that defensive measures were uncalled for because no country had the intention of attacking Germany. In opposition to this itmust be pointed out that the leadership of a country has the responsibility of taking precautions in vitalpoints in view of even the most remote possibilities. There is never a period, inwhich, within a reasonable space of time, a country can completely exclude the possibility of war brought on from the outside.

As changes were created in the leadership of the Armed Forces through Hitler's decree of 4th of February 1938, it was not noticeable at first, as the Reich Defense Council did not meet at all, that its personnel composition according to the Reich Defense Law of 1935, no longer agreed with this decree. Only when Keitel as Chief of the Council pointed out these discrepancies, were they removed through the new Reich Defense Law of the 4th of September 1938 and at the same time -- as people were generous in the Nazi regime as regards organizational matters and as they loved exaggeration and artificial distension -- a huge organization was created. The Reich Defense Council was remodeled, the Commission was changed somewhat as regards its personnel. A "Plenipotentiary for the Administration" was created as well as the "Plenipotentiary for War Economy." Both together with the Chief of the OKW formed a staff of three; and most of the other ministers were subordinated to them in separate groups. The entire body, however, with the exception of the Commissi was to go into action only after the outbreak of a war, when the extensive legislative powers of the staff of three were also to become effective.

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When the war actually broke out, Hitler did not concern himself with these preparations on paper, however, but created the Council of Ministers for Reich Defense" which thereby virtually replaced the current organizations. Only later, when the legislative machine of the Council of Ministers was too slow, did the authority of the staff of three appear again, and decrees were based on their decisions. Even if it was the duty of the staff of three just as it is the general duty of every department, to have ready those measures in its own particular field which are necessary in a purely defensive sense, still one cannot infer from this any aggressive intentions, or even the consciousness of an approaching war. Such general war preparations originate in the constant and inevitable supposition of the possibility of war. There is no indication in them of aggressive intentions. If one did regard them as such, then every country would have to be regarded as planning aggression, since no state can omit such preparations. The staff of three did not hold any discussions until the outbreak of the war, and could therefore neither have worked towards a war nor made any plans for a war of aggression. The same is true for the Reich Defense Council. It did certainly meet twice but just how unimportant these meetings were, particularly how little suited they were, especially to the making of the most secret plans, is shown by the fact that of the 12 members of the Council only a part appeared, whereas there was a very large number of counsellors from the individual departments. The large group of persons who attended - once about 40 and another time as many as 70--could not have allowed a subject to come up, which needed handling in such a discreet way.

In reality the entire action of these two meetings was limited to the partial announcement by the defendant Goering of the contents of the non-published Reich Defense Law. Otherwise there were no meetings or written discussions by the members of the council.

Therefore, in summing up it can only be said that an organization was actually created here for the event of the war, but that in practice it never worked. If the goal of this organization actually had been the preparation of a war of aggression, then the great number of tasks which in this case had to be undertaken more or less in view of time, would have necessitated the actual work of the organization already in time of peace.

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The "Law concerning the Rebuilding of the Wehrmacht" of 16 March 1935 and the "Compulsory Service Law of 21 May 1935" have also been brought into the discussion by theprosecution. I do not wish to discuss at this point whether these laws constitute a violation of the Versailles peace treaty or not, since the only thing that is relevant for the judgement is whether the fact of the issue of these laws can be considered as a proof of plans of aggression. Already the necessary publication of the entire contents of these laws shows that they were not the basis for such a plan. The limitation to a comparatively small number of divisions in the law of 16 March 1935 already makes it impossible to think of a war of aggression.

The introduction of the General Service Law also is no indication of plans of aggression. Compulsory defense service was introduced in most countries and no doubt had ideological grounds apart from the intention to increase the armed forces' reserves.

To form an opinion of these laws which concerned the military organization, it must be considered that the introduction of compulsory military service in March 1935 made a new set-up of the military organization necessary. In previous years practically nothing had been planned in this field. It was not surprising, therefore, thata decree was now issued containing the principles required. This complete and compulsory reshaping of an organization necessitated the laws mentioned, without providing any reasons to conclude that a war was being planned.

As regards the question of whether all the Cabinet members were informed of the situation, there need be no discussion as to whether at the outbreak of war German war preparations were actually ready for an attack. The legal basis, for only to this extent had the majority of Cabinet members to deal within their departments with questions of rearmament, could give no comprehensive insight into the actual extent of rearmament. They were restricted to whatever information was furnished them. The generals themselves were of the opinion that, given the extent of the rearmament, it could only have a defensive nature. Hitler himself told them nothing of any aim at an aggressive war.

Finally, mention must be made of the law of 13 March 1938 by which Austria's Anschluss to Germany was announced. This law was not agreed upon

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by the entirety of the Cabinet members. Previously, the ministers received no information of any kind as to the march of events. They merely received word in theusual way about the fact of the entry. As regards the other laws brought up by the Prosecution, the idea that they have any connection with the planning of a war of aggression, is, in my opinion, so far-fetched that I need not go into them in detail. There are factual reasons for the creation of these laws which cannot be denied. They are included in the official grounds for the drafts of the bills, as shown in my Document Book. These grounds were added to the drafts of the bills for ministers as regards the meaning and purpose of the laws. These laws were, by the way, decreed at a later date, after which, as I have explained above, there were no longer any cohesions between Cabinet members.

The latter point of view applies in particular to the laws which were issued during the war and which have not been mentioned in detail in the indictment, either. For this period we can no longer consider a collective functioning of the Cabinet. At that time, the complete organizational reshaping of the legislative already showed itself if only outwardly in the fact that the essential laws had been issued by the newly created offices which were endowed with full legislative powers and set up for thedifferent spheres of activity. Stress was laid on theFuehrer decrees and the Fuehrer orders, especially as regards all fundamental and general political questions. This excluded, to begin with, all otherfunctions bnt the purely departmental, subordinate work of the ministers. The conception of the unity of Cabinet members making their own free decisions and cooperating together had become a phantom long ago. Consequently, the responsibility for each individual law can be charged only to the individual or to those ministers who participated in making them, but not to the Cabinet.

The Prosecution sees the aim of the crimes of the Charter as revealed in the activity of the Reich Cabinet especially emphasized by the fact that a close connection existed between the highest Reich offices and the Party. Individual ministers are said to have held thehighest party offices. The "Law to Ensure Unity of Party and State" was to secure cooperation between the party and state offices. By this infiltration of the party into government leadership, party ideas became practically the substance of government leadership.

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In reality, neither the "Law to Ensure Unity between Party and State" nor later decrees could secure full cooperation of the government with the party. It was here that the difference between the opinions of the Ministers and the leading party offices became most obvious. The ministers looked on their tasks in the administration as mere matters of state. The party had to struggle constantly, supported by Hitler's decrees, to obtain increasing cooperation in the affairs of the state offices. The witness Schlegelberger has given a clear account of this. He declared that a considerable part of the working expenditure in government agencies, especially in the Ministry of Justice of which he himself was the head, was used in order to keep off the repeated attempts of the party offices to make their influence felt. We saw Fuehrer decrees which were supposed to accomplish this until the very end of the war, a sign that the party never fully succeeded in its intended penetration into the government administration. It is, therefore, not possible to follow the prosecution in its claim that owing to its penetration by the party the state apparatus was practically an instrument of the party.

In summing up I therefore come to the conclusion that the tiral has in no way proved that collectively the members of the groups included in the indictment ever desired a war of aggression and its criminal consequences as stated in the Charter regulations, or that they even set it up as their goal and directed all their activities towards it. Anyway, as long as one can speak at all of a certain cohesion in the Cabinet, - until 1934, - the true realization of this aim may not have been clear even to Hitler. Inasmuch as he himself reckoned perhaps with this possibility and took account of it in his decision, nevertheless, all the circumstances show that the group of people indicted here were the least suitable to be informed of such plans or even possibilities. If on 5 November 1937 Hitler did not consider the Cabinet worthy of receiving his first pronouncement as to his purpose, when he further divided the Cabinet to a much greater extent, and even went so far in his secrecy that he withheld preparations for a war which concerned a certain department, from the minister himself, as in the case of Darre, divulging them only to a competent expert official, form all this we can see quite plainly that collectively the Cabinet neither had the knowledge of the aim which is affirmed nor could have directed their activities towards it.

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Were the thesis of theprosecution correct, Hitler would have left the existing organization as it was and would not have undertaken a complete reorganization of those in the key positions. His allegedly loyal and conspiring followers would best have been suited for the actual execution of the general plan when it had been drawn up. With regard to people in the Cabinet it also seems an absurdity to imagine so close and intimate a collaboration between its members and Hitler. Here were men from themost widely separated camps. The ministers of the individual departments, who were partly taken over by Hitler and in part newly assigned, were by no means his party members. And evenbefore, the great majority of them had no close connection with him. It is impossible to explain psychologically how and when Hitler won over thesepeople not only to share his party ideas for their common purpose but also to commit the capital crimes of the Charter. And we see a constant change in the personnel of the Cabinet. People like Hugenberg, Papen, Schmidt, Eltz von Ruebenach and Schacht leave the Cabinet. All of them have differences with Hitler, based partly on far less weighty grounds than are represented in the crimes of the Charter. But according to theindictment all these people at the very start of their activities as Ministers are said to have blindly acquiesced in the criminal plot. To mention only the case of Eltz von Ruebenach which has been brought up by the Prosecution, does it seem feasible that on accepting the golden insignia of the party a man should express his religious scruples against Nazi ideas, when on the other hand he was already connected with such criminal aims and had beenactive in them for many years. Is it not clear from his very letter to Hitler that he had no doubts as to the integrity of the Cabinet's works. How could a man like Minister Popitz be connected with such aims and their attainment when as a conspirator on 27 July 1944 he sealed with his death his active opposition?

The circle of persons contained in theindictment under the conception of "Reich Cabinet" is small. And just this very thing which gives us a clear example of how dangerous it is to confirm to the explanation proposed in judging the character of a community of persons and at the same time the character of an individual.

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The indictment is particularly directed against the Privy Cabinet Council and the Ministerial Council for Reich Defense. I need say little about the Privy Cabinet Council. It never met and so never took any decisions or showed any activity. It was founded for personal reasons connected with the departure of the Foreign Minister von Neurath. In this Cabinet Council, which was merely enacted by law, but which in practice was never active, no plans could have been made nor anything done towards their execution. The Ministerial Council for the Reich Defense had been founded by a decree of Hitler at the start of the war. It is incomprehensible to me personally on what grounds the prosecution places the Council of Ministers undera separate indictment, as a separate institution within the framework of the Reich Cabinet. All its members belong to the Cabinet and up to Lammers they are all present in the dock. In no case could there be any practical value for the declaration made with regard to the number of people accused. So it seems that the prosecution itself had doubts as to the acceptance of its arguments concerning the entire Cabinet and wants to ensure the sentencing of this part of the Cabinet members, at least, as a minimum of its motion.

My arguments for the Reich Cabinet are correspondingly valid for the Ministerial Council. Moreover, the prosecution has permitted the absence of arguments in which it sees the Council's participation in the Charter crimes.

It is clear to me that the scope of this trial did not make it possible to establish, even in the small circle of Cabinet members, the intentions, action and motives of individual members. The provision in Article 9 of the Charter is not a compulsory one. It should provide a technical facilitation for the inclusion of greater quantities of persons. The case of the Reich Cabinet embraces a numerically small circle. 17 of them are present in the dock. Apart from these there are only 20 still alive. There exist sufficient factual and legal possibilities to judge their former activities with perfect clarity both objectively and subjectively in an individual procedure, this being also necessary in view of their importance up to now in public life. To put all of them now into one category and by the verdict

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to outlaw all of them, including those members who are dead, and to deprive them in subsequent proceedings of an argument which would affect an essential part of their defense - for this there are no reasons of any practical nature. In the case of the Reich Cabinet practical considerations should not lead to the sacrifice of the universal principles of legality for the sake of practical requirements.

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Finally, I feel obliged to express the following idea which generally regards the problem of the organizations: Mr. Justice Jackson termed also considerations of expediency as being decisive for the verdict asked for by the prosecution. He believes that otherwise a great number of participants in the crimes would not be included. The anonymous perpetrators would perhaps remain to a certain extent in the background. He believes that one can also see a political reason for the verdict asked for in the principle that the "good ones" should be separated from the "bad ones."

I have explained in my statements that a general condemnation of an organization would necessarily and ultimately include in the essential points a condemnation of possible innocent persons. But is this sacrifice of the absolute principle of justice really necessary and worth being advocated for considerations of politicalappropriateness? Willthe political goal be finally reached at all in this way? The larger the circle of persons included in a verdict, the more diminished the desired effect of degradation. If several millions of members are declared as criminals, and if one considers that the dependents ad friends of these proscripts also do not remain untouched by such a declaration, I believe that whatever is intended by the separation of "good ones" and "bad ones" will not be reached. By such an expansion of the circle, the person who judges sees in the foreground those persons who, according to his opinion, did and desired nothing wrong. The intended effect can be attained only if the circle of affected persons is limited to an extent which allows to recognize, even when judging critically, a just separation of really bad elements.

The possibility of separating morally and partly also actually a part of the population from the body of the nation is numerically limited. I ask that this also be considered if one has in view the aim of a general appeasement.

I also do not believe that the verdict asked for is necessary in order to lead to their punishment perpetrators who hitherto remained anonymous. Those who can be considered as perpetrators have been for the greater part seized. Their examination in the internment camp and in the denazification proceedings provides a goodpossibility of determining the real culprits. Therefore, if a condemnation of all members of an organization is not necess-

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in order to attain the endeavored goal, the transgression against the security offered by the law which such a condemnation forcibly brings on appears particularly objectionable.

One of the most oppressive forms of the Nazi regime we suffered in Germany was the feeling of legal insecurity. We, who had to deal professional with these matters, we had to experience daily what it means for a legal-minded person to know that there was no legal system based on fundamentals and codes to give the individual that protection which alone makes him a free person. The feeling of insecurity, that on the grounds of some considerations of political expediency, one could be seized at any hour by that system violating this primitive right of men, weighed upon every German. With the present change of the whole situation they all want to consider this condition as finally removed once and for all time. After the experience of the past they consider that the principle of justice in particular must be without compromise. One desires to live with the conviction that only he can lose his freedom whose criminal activity is established beyond question in a legal proceeding provided with all possible legal guarantees. Therefore, innumerable people look full of expectation upon the first tribunal which will help this principle to prevail which has been dragged in the mud for years, as an example to the world. All of us who were called to cooperate in these proceedings found this hope strengthened in all phases of the trial. The Tribunal faces now the decision of whether a verdict according to the notion of the Prosecuti shall actually include innocent people, too. Representatives of the prosecutio have declared, of course, that by cautious use of the legal possibilities the number of persons to be subsequently prosecuted could be limited to such a minimum that actually guilty people only would be reached. However, even if this intention could be carried out to the full extent in all zones of occupation, it must be considered that independent of this practice to be hoped for, the fact remains that the verdict in itself establishes the legal rule and the legal possibility for prosecuting on account of membership as such. Even if one does not agree with the legal aspect of this possibility I developed, the legal question concerning material and procedure is of such problematic nature that for the individual innocent member that is no absolute legal guarant

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that he will not be prosecuted. Therefore a situation would be finally created in which an endless number of people would live in a state of latent uncertaint and would not be able to foresee whether they will ever be prosecuted and sentenced on the ground of legal possibilities. Especially, the minor cases would be affected, who in any case would probably be set back by the nati nal tribunals in the order of procedure.

In view of the vast number of members and their relatives affected by the trial of the organizations, a situation would thus be created for millions which could deprive them of what we see as our highest goal: to win back the feeling of having judicial and legal security.

THE PRESIDENT: The Tribunal will adjourn until 2:00 o'clock.

(A recess was taken until 1400 hours.)

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AFTERNOON SESSION

(The Tribunal reconvened at 1400 hours, 28 August 1946)

THE PRESIDENT: The Tribunal has just received an application dated the 18th of August from Dr. Gerges; that application is denied.

I now call upon Dr. Boehm.

DR. BOEHM: (Counsel for the SA) Mr. President, High Tribunal: It is in contradiction to the fundamental rights of every man to be made responsible only in accordance with his own guilt, if he could be submitted by the possible result of the collective indictment against the organizations to the provisions of law number 10 of the Allied Control Council. An atonement without guilt hasbeen considered unjust since the beginning of human history. The one who desires to punish, therefore, has to establish the guilt of each individual if more than one have participated in a crime. If the planning of a crime is considered punishable as an act of preparation, only those can be punished, in accordancewith the legal andmoral principles which have been in force up to now, who participated in the plan--that means, who joined together just for the desired and conscientous carrying out of that purpose.

At no time have these principles which emerged from fundamental human rights been replaced in any national criminal law by the concept of "Conspiracy". Based on the definition devdoped by the main prosecutor, a guilt results when;

(1.) An association existed for the accomplishment of a jointed and common plan.

(2.) When these aims were criminal.

(3.) The pursuance of these aims produced the criminal deed inevitably and finally.

(4.) The method of the carrying out of the deed was in accordance with either means agreed upon at the time of joining or subsequently approved of.

We must therefore examine:

(A) To what extent the here-mentioned facts of a conspiracy are covered by the concept of law as presented by the prosecution; and

(B) To what extent these facts were carried out by the members of the organizations.

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Seen from here, the fact of a conspiracy limited not only by German concepts of law, but also by well-known penal laws of other civilized countries, seems to cover completely the limit established by the prosecution in the court session of the 28th of February 1946; so that, if we recognize the soundness of this argument, we have only to examine the aforementioned second question, i. e., to what extents members of the SA involved themselves criminally in the execution of thus limited facts.

This question touches upon a judgement of value and a question of fact. First, a justment of value, inasmuch as the concept "criminal", which is used in connection with the aims of the organizations, necessitates an unequivocal limitation.

For German subjects, actions committed within the German power sphere are criminal only if they are punishable by the German penal laws. According to principles of International Law, which have been recognized until now, a people is not bound to consider criminal what other peoples consider as criminal, but only what it has adopted in its own ethics and legal awareness as "criminal." At any rate, after conscientious investigation of this question we find that the German people without exception -- that is also the mass of the members of the SA indicted in Nurnberg - has never differed in its ethical and legal basic attitude from the fundamental laws of the rest of the civilized world. The millions of its members considers as a crime a war of aggression as defined in Article VI of the Charter. Furthermore, all SA members would never argue the point that actions as defined in Article VI of the Charter as crimes against humanity have always been contradictory to their principles and must therefore merit becoming criminal from their standpoint.

Apart from the promises of the trial, which are contested, the defense must only investigate the question whether the accused organization, the SA, at any time, endeavored to realize such criminal aims, or permissible aims, which precluded methods, however, of criminal character.

This has been alleged by the Prosecution.

The aims of the accused organizations were clearly outlined by the Party program and the Charter. The means for the realization of these aims were

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visibly limited in the Reich Laws and regulations published in the Reich Legal Gazette. An accused organization can be considered only an affiliation of persons whose common and general endeavor was exclusively directed towards realization of the indicated aims with means admissible according to German law. Thus, the aims and the legally limited means for the realization of these aims, which were openly known not only to themembers of the accused organizations but to the entire world, can not have been considered criminal by the world which formerly recognized the National Socialist government, even after the union of Party and State was emphasized, despite their knowledge of the aims and legally limited methods for which this National Socialist Government was responsible. Not only did the world recognize this governmebt, but this recognition was repeatedly and visibly expressed to the German people by the conclusion of a number of interstate contracts and at the end in the Munich agreement of the 29th of September 1938, and in the Russo-German Non-Aggression Pact and the Secret Amendment of the 24th of August, 1939.

The criminal character of the SA alleged by the prosecution must be founded differently than by a mere indication of the criminal character of the National Socialist ideology. If the idea itself is not already criminal, then the criminal character of an organization intended to carry out these ideas can be derived, if at all, only from the criminal methods which, to use a phrase of the Tribunal, were so completely evident, or had become known to the members of the accused organization in another way, that it can be generally assumed correctly that the members had been informed about these purposes and activities.

Thus the Tribjnal itself has defined with unequivocal clarity the objective and subjective characteristic parts of an action which must be fulfilled if the International Military Tribunal wants to designate the SA as a criminal organization.

To characterize an organization or an individual, only typical occurrences may be used which we find in other countries also without being occasioned so far as to designate the executor of these occurrences as criminal. To be fair, therefore, these occurrences can also not be used

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in the proceedings of the International Military Tribunal to prove the criminal character of the accused organizations. Thus, it can not seem just to the defense if the prosecution tries to derive the criminal character of the accused organization, for instance, by establishing that the Party and their organizations effectively controlled the machinery of the State, quite apart from the fact that the SA did not have power to do this.

Even if we submit the use of such methods by the SA, they are not unique in the world, and do not belong into the past. But as long as these methods are not regarded and treated as criminal all over the world, they should not be justly used as a criminal characteristic of the criminal character of the indicted National Socialist organizations.

The allegations of the prosecution to this effect must therefore be eliminated with the establishment of the proof of a criminal quality.

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Just as little may be used for the declaration of the criminal character of the SA, those happenings which have taken place entirely outside of the framew of the SA Organization, happenings of which "in general it cannot justly be assumed any more that the members were informed about the happenings."

Thus, the Defense of the SA has to prove that.

1. There did not exist at any time a common and joint plan of the SA member to commit crimes of the nature described in Article 6 of the Charter.

2. That neither at the time of their joining, nor during any other period of time, the mass of the members of the SA were trained to realize the Party Program, or the special aims of the SA by the use of illegal means, particularly by the employment of terror and force.

3. That if illegal actions have been ascertained, the result of the examintion and interrogation of many thousands of members showed that these happenings lack the characteristics of a plan involving the mass of members, and that, therfore,-- because they were standing entirely outside of a common, joint plan--can be charged only to a certain group of individuals, or very limited categories, groups of persons within the SA.

It is not true that behind those horrible events there was, from the very beginning, a general and common plan of a mass organization to commit actions of this type, ot that these actions really "were so completely open, or had otherwise so generally come to the knowledge of the members, that the members as a whole could rightly be legally charged with their knowledge."

As for the crimes against peace presented by the Prosecution, it must be stat first that the preparations for a war of aggression, if they are to lead to the desired goal, must under all circumstances remain secret. Even if it were true that the Riech Cabinet or the General Staff had prepared a war of aggression, the is an almost irrefutable assumption that they not only did not inform the indifferent mass of millions of SA members, but, on the contrary, saw to it scrupulously that these preparations remained secret. But if such preparation was unknown, the the mass of millions couldat no time have the consciousness that the defensive wa begun by the Reich leadership, was in reality, as the Prosecution contends, a wa of aggression, participation in which might perhaps have been evaluated as a crim against the peace.

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Crimes against the customs and rules of warfare are, according to their nat individual actions of closely restricted groups of persons or formations, whic are also kept secret by the higher leadership in order to prevent the internati al law principle of retaliation from being applied. Even if it were possible to see in the mere approval of such violations of the recognized rules and laws of warfare a punishable participation, the prosecution would still have the proble which has not yet been solved, and which is probably not capable of solution-- first to bring evidence that at least the overwhelming majority of the SA memb had known of such a planned commission of crimes against the customs and rule of warfare. Quite aside from these assumptions, which are contrary to essenti contentions of the Prosecution, however, the defense can prove, after questioni many thousands of SA members, that, if violations of the law occurred, they turn ed out to be, according to a legally necessary analysis by time and place, on the whole, only mutually independant actions of individual persons or closely restricted groups of persons, free from any general planning; therefore, there is not justification for treating them as "typical manifestations" of a uniform plan which might justify characterizing the SA as criminal.

For, it is not the fault of the defense that part of the members could not be heard,. In cooperation with the General Secretary's Office, the Defense did evrything possible to have those witnesses brought from the Russian Zone with whom they were able to correspond up to the time when the witnesses were named. I state, furthermore, that the SA members living in the Russian Zone could not b given their due hearing, since, according to my information, most of them were kept in ignorance of the charge against the organizations. This is one of the most important objections of the trial which will always remain in history.

THE PRESIDENT: Dr. Boehm, that is a most improper observation of you to hav made. There is no evidence that members of the SA have been kept in ignorance. On the contrary, the same requisites have been posted in the camps in the Russian Zone as in the other Zones, and, moreover, the Defense Counsel, Dr. Servatius, w has been in the Russian Zone, has made no complaint to the Tribunal. We consider that as an observation which no counsel ought to have made.

DR. BOEHM: It is particularly on the strength of what colleague Servatius said, that I am in possession of that information.

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THE PRESIDENT: Dr. Boehm, Dr. Servatius said no such thing to this Tribuna On the contrary, he said that he had been properly treated in the Russian Zone.

DR. SERVATIUS: Mr. President, I have been to the Russian Zone, and by my g wish, I have been able to visit two camps. In my final plea I have pointed out and asserted, according to the information that I have at my disposal, the announcements had taken place in all camps, and I had only had time to see two camps, which I, myself, had visited, and that is what I actually stated here Court.

THE PRESIDENT: Thank you.

DR. BOEHM: In that case, the information which had reached me, I must have misunderstood quite wrongly, Mr. President.

(Going on with document) I should also like to emphasize the limitations arising for the Defense from the fact that, in spite of all efforts and indication of exact addresses, part of the witnesses living in other zones did not show up In particular, the witnesses Fust, Lucke, Alvensleben and Wallenhoefer are miss Because of the failure of appearance of these witnesses, the statistics of the and the relief fund are also lacking, which are necessary to form a judgment of events before the year 1933, which would have shown the terror against the SA. Moreover, a part of the documents, which were requested and which were approved by the Court, did not reach the hands of the Defense.

Thus, the International Military Tribunal in the judgment which it has to p can base its decision only on the fact that illegal actions were committed on by a limited number of persons, or numerically restricted groups of persond, activities can no more place this stamp of "criminality" on the organization as a whole than a number of crimes to be found in any nation can characterize that nation as a criminal nation.

To sum up, from the point of view of the defense, one may state that the ch raised against the organization SA as a whole, and affecting even the war dead, lacks basic, formal and material prerequisites, the neglect of which, involved any unfavorable decision of the Court cannot be reconciled with the "healthy po lar feeling" or with the efforts of the United Nations which were born from pai ful experience "to restore confidence and fundamental human rights, and to creat conditions under which justice and respect for international law can be maintai

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The Prosecution states that the declaration of criminality is necessary in order to create the prerequisites of condemnation of a large part of the non-transferrable immediate perpetrators, as well as to punish the moral accomplices. According to the charges of the Prosecution, the supreme SA leadership -- to give the main charges -- must have done or tolerated the following:

(a) Prepared, or planned, or ordered a war of agression.

(b) Tolerated or carried out atrocities, or other crimes in the concentration camps.

The presentation of evidence has clearly established that no orders were given to this effect by the supreme SA leadership, and that no misdeeds were tolerated

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In any case, the assertion that the real perpetrators are not to be found in most cases, is false.

If a war of aggression had really been planned, only a few people, but never 4,000,000, could have been concerned in this planning. The perpetrators of the Jewish persecutions, limited as to locality and time, are known, or at least traceable. Since the localities of the Jewish persecutions in November 1938 are known and the perpetrators can be established by witnesses or by documents as is proven by the present trials for the Jewish pogroms in 1938, for instance i Weissenburg and Hof, it is unnecessary to create an assumption through a declaration of criminality, especially since those actions were refuted by the majority of SA members. The localities where concentration camps were situated and the names of those responsible for the actions committed in these camps are well known. This is borne out by the numerous trials against concentration camp commanders and military guards. Are millions of SA members, 70% of which were at the front, when during the Second World War these terrible happenings took place in the concentration camps, be made responsible for them, when even ministers declare that they had no knowledge of these events? It is the perpetrators who should be seized. A collective arrest, however, of 4,000,000 men, is unprecedented and unique in the history of penal law. This measure is inhuman and is based upon the extending of the concept "Helper", which disregards all legal security and the principle of all criminal codes.

The basic idea for the conspiracy is that an adhesion to an organized group of persons, which, at the moment of joining, is already prohibited, is punishable. Upon their joining, the newcomers must therefore be conscious of the fact that they are committing an unlawful action.

A retroactive declaration of criminality aiming at making a subsequent proceeding against individual members possible, violates the principle "nulla poena sine lege" . The International Control Council has expressly established this principle in its

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first law of Law Practice in Germany. The International Tribunal cannot disregard a general legal principle of the Inter-allied legislative organ, which is authoritative for Germany.

In case of a declaration of criminality, another principle would be violated. Through the recognition of the German State and thus of its leadership, through the constant participation of representatives, at noteworthy occasions, such also as SA manouvers, through different agreements, the allied powers gave the example that they recognized the German leadership and its organizations as legal. The document which I cited, quoted, "SA 229", The political ordinance of the Inter-allied Rhineland Commission and its Application in the years 1920-1924", establishe, that on the 21st of March 1925, the Rhineland Commission revoked the inhibition of the German Liberty Party (Freiheitspartei) and of the National Socialist Party. An affidavit from the Palatinate (Pfalz) (affidavit General SA Number 42), which was submitted by the defense, shows that all social functions organized by the NSDAP and the SA were approved by the French occupational authorities before the year 1930. The foreign policy of the Allied States must have had a better view of the entire political situation than millions of simple SA men who, considering the politi situation, could not have had the impression of committing an illegal act by entering or remaining in the SA.

The present Prosecution of the organization then recognized contradicts the universally accepted legal principle: "nemo in factum proprium venire potest." This norm of Roman Law which is used as a rule of interpretation in international law, claims universal validity.

The Prosecution employes considering the SA a number of over-simplifications concerning purpose, place, time, and cooperating personalities which alone enable the Prosecution to give a basis for the declaration of criminality. In other words: the Prosecution acts as if there had existed a uniform personality "the SA" that means one with an uniform leadership, responsibili-

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common purpose, intention, membership, and uniform attitude. Without such generalizations the Prosecution would never accomplish its aim; for instance, in the question of aggressive warfare and the persecution of the Jews. By doing so it abandons the original problem of mass liability which justly can be solved only by a great number of individual statements and the study of the agreement of action and opinion in a majority of the members. In contrast to such an opinion, we cannot stress too strongly the factual split of SA concerning the aims of the leadership as well as the membership, and the limitation in time and space of the deeds which make the things which happened nothing but individual occurrences which took place within an organization of four millions during a period of existence lasting twenty years

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It would have been necessary for the prosecution to prove that the majority of the members of the SA held the design, had the inner will, possessed knowledge of the criminal purpose and of the facts as well as of the general consciousness of the unlawfulness. As this is impossible, the prosecution put forward the theory that the facts and purposes were so obvious that everyone might have been aware of them. If all this had been so clear to millions of simple people why, then, did the Allies until 1939 maintain relations with, and make agreements with, this State which, it is alleged was supported by bands of criminals? The theory that the members of the SA would have been in a position to know and outhg to have known in these circumstances the criminal aims and deeds, involves the abandonment of any real examination of the question as to what the majority of the members did or did not know.

The prosecution practically concent themselves with the hypothesis of design. In doing so it overlooks innumerable speeches which were made to cheat the German people, it forgets

1.) that quotations from foreign sources concerning the value of the National Socialist state appeared in the press;

2.) that in the course of those twelve years actual events were presented to the German people and to the mass of the members of the SA in a veiled or cleverly adjusted form.

That, furthermore, design can only be considered in conjunction with concrete facts, to which I propose to refer later, is so obvious that it is unnecessary for me to say anything further. I merely want to point out that innumerable affidavits contained in the collective summary which I have submitted prove ignorance of, and non-participation in, the following crimes: Persecution of the Jews, planning of a war of aggression or commission of atrocities of all kinds.

But I want also to point out in particular that there is no relationship between the main defendants and their actions and the membership in the SA. The SA can -- if at all -- be rendered responsible only for actions committed by persons in their capacity as members or leaders of the SA, but not for those

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committed by persons, for instance, in the capacity of Reich Ministers, Reichsleiters, Gauleiters, Regional Commissioners, or other functions. Apart from a short term of service in the SA before the 9th of November 1923, Goering played no part at all in this organization. His subsequent rank was only that of an honorary leader. The same applies to the defendant Frank; the SA cannot be rendered responsible for his deeds as Governor General of Poland. He was not the leader of the SA formations which were composed of the German nationals or of the members of the German minority doing service in Poland. Rosenberg, Bormann, Schirach, Streicher, Hess, Sauckel had no associations with the SA. Bormann was, as the witness Juettner emphasized in his evidence, one of the most severe opponents of the SA. Streicher was the man who eliminated the SA-Obergruppenfuehrer Stegmann.

The propaganda, to which also the prosecution has fallen victim, shows a national socialist state in which the Party, the State and the Armed Forces on the one hand, and the Party and its organizations on the other, represent one uniform whole. In fact, there existed profound divergencies. If was just owing to these divergencies that Adolf Hitler had an unheard-of power over the persons and an unheard-of independence which he enjoyed, as it has only now become evident, with a limited number of those who had his confidence. I only wish in this connection to recall the divergent views held within the Party, that is to say, also as between the leading men like Goering, Goebbels, Himmler, Lutze, on the Church question and the Jewish problem. It was not easy to the average man and to average member of an organization to visualize and to find a clear line on the background of the variety of tendencies manifesting themselves among the various elements concerned.

But none of the problems, in particular not those concerned with war or peace, were in regard to their solution such that they might have been the object of a conspiracy.

Juettner's evidence as well as the affidavits submitted by Hoerauf and Freund point to the fact that the supreme leadership of the SA had close associations with British and French quarters up to the moment when it was politically eliminated and that it entertained these associations with a view

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to creating a Western Pact. I have proved that financial assistance from abroad was given to the SA in connection with these negotiations; I have also shown that the leadership of the SA was actually engaged, in 1932, in negotiations with German government quarters for a coalition directed against Hitler. I have proved that from a political point of view there existed three tendencies as regards foreign policy. I also indicated that the Eastern and the Western tentency were in sharp contrast to each other. May I, in this connection, refer to the sentence pronounced by the British prosecution which is contained in the Minutes of the 31st of July 1946 and reads as follows: "If the German side could show that the British government had given economic assistance to the SA in order to bring it into power, subject to the condition that Roehm were placed in control, the defense would, indeed, have considerably advanced its own case. Because it is obvious that the government of 1946 could not join in the trial against the SA if it had supported the SA in 1934."

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The affidavit submitted by Heerauf shows very clearly and beyond doubt that the negotiations carried on between Anglo-French political quarters and the SA leadership in these days were, indeed, perfectly obvious. I have furthermore shown that the contacts which were established with Britain and French quarters represent a thread along which events developed in 1934.

The prosecution reproached the SA with having at all times been a willing instrument in the hands of the conspirators. The best proof to the contrary are, no doubt, the events of the 30th of June 1934. Again and again the erroneous opinion is heard in connection with these events that it had been possible in these days to crush an SA Putsch or a Putsch of a small group intent upon seizing power. There can be no greater mistake than this theory; because the fact is that, as shown by Fruend's affidavit General SA-83, the SA practically lead a life of its own within the Party. It is clear beyond doubt that at the time of the Chief of Staff Roehm a great mass of the SA had little or nor contact with the Party. The situation in 1934 was such that every free expression of an opinion, particularly also in the Party itself, had been suppressed and regimentation had become almighty. Everything was under the influence of the Gleichschaltung tendency or Party enforcement in all spheres, coercion was triumphant and dominated public life completely. The Reich government had already been practically eliminated at that time. The Reichstag was nothing but a dummy and was of no positive value whatsoever.

There was a time when the SA had enthusiastically stood by their leaders but it now realized that Hitler as the Chief of Staff put it, surrounded himself with demagogues and non-politicians and, instead of being a national leader, had become a dictator. The supreme leadership of the SA viewed this development with growing distrust because it involved the great danger that the nation which had given unrestricted full powers to the Fuehrer was completely eliminated from the future development of the Reich and its policy. This danger and the conditions created by coercion brought about an untenable situation. Thus, therearose, at first strictly camouflaged, the opposition of the supreme SA leadership under the command of Chief of Staff Roehm.

The idea was to eliminate the existing system and to replace it with a real government of the people supported by the active cooperation of the whole

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nation. All the preparations, which were also mentioned by the witness Juettner at the meeting of the Commission, were made along these lines. It was shown that Roehm intended at the Kulmbach meeting to gather information on the situation of the workers as it had emerged from the dissolution of the trade unions by Ley. It must be emphasized in this connection that Roehm authorized the participation of members of the SA in the action connected with the dissolution of trade-unions merely because the organizations of the Left had kept arms in the labor union headquarters, and that it was to be expected at any moment that civil war might spread from these trade union headquarters to the nation in general.

Roehm intended to dissolve the SS. This is proved by the affidavit of the former SA Brigadefuehrer Fruend. Roehm's endeavor to achieve the consolidation of the Central European area by way of negotiations with the Western powers is connected with this new State which was to be created. It has been shown that these negotiations had been under way for a number of years. (Juettner's evidence, Fruend's affidavit.)

One of the last negotiators was SA-Obergruppenfuehrer von Detten, as explained in the affidavit of Brigade-leader Fruend. All the documents dealing with the defense-political aspects of the SA's indictment by the prosecution are related to this unsuccessful attempt made by Chief of Staff Roehm who believed, as the witness Juettner clearly testified, in the creation of a popular militia according to the Swiss model and based upon the framework of the SA as part of the great plan for the creation of a Western Pact. It is regrettable that it was impossible to produce some witnesses who might have given further information on this matter to the Tribunal. Roehm's attempt failed. In addition, differences with the Reichswehr also contributed to his downfall. The 30th of June 1934 is the result of this development. The first attempt at putting an end to Hitler's dictatorship had definitely failed. More than 200 SA leaders were shot. Since that time Heinrich Himmler was uncrowned king in Germany.

The true background of the 30th of June 1934 was not to become known in Germany and abroad as this would have seriously shaken Hitler's prestige and that of his government. This was the reason why the camouflage and

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smokescreening machinery of the press was set in motion on a large scale to divert the attention of the masses, and this was also the reason why so many were shot, who were to be kept silent and could not speak anymore. Among Party members it was forbidden to discuss the 30th of June 1934 at all.

It is an interesting parallel that on July 20, 1944, again an SA-leader was participating, SS-Obergruppenfuehrer Graf Hellderf. He was hanged.

Since June 30, 1934, the SA had sunk to complete oblivion. After June 30, 1934, the SA was considered an unpleasant appendix. The SA was considered politically unreliable. Therefore, as shown by evidence given before the Commission, it was not charged any more with any tasks. The SA's destiny from that day on was nothing but the search for a task. Officially the SA was supposed to take in its hand the premilitary training and athletics.

In reality, however, the Party charged the SA with totally inferior tasks. This attitude of the Party towards the SA became evidence in 1939, too. As Witness Juettner clearly stated, it was Bormann who sabotaged the decree of January 30, 1939, and who did not permit the carrying through of the premilitary training task of the SA. Witness Beck reported to us the preparation and the beginning of the premilitary and postmilitary training program. He also stated that this task of the SA was terminated. Only the events of the war brought the so-called War-SA-Wehrmannschaften.

Thus the SA never could, in contrast to the claim of the Prosecution, participate feverishly in the preparations of war. It is absolutely impossible that as the Prosecution claims 25,000 officers were trained in SA-schools. This claim was quite clearly refuted by the evidence given through the Witnesses Juettner and Beck. How unreliable the SA was in the eyes of Bormann shows the fact that

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the Volkssturm was not based on the SA. We learn from submitted affidavit that the reason for this was the unreliability of the SA (General SA No. 67). The elimination of the SA is also demonstrated formally if they recollect that Morehm was Chief of Staff and Minister of the Reich, Lutze Chief of Staff and Reichsleiter, and Schepmann only Chief of Staff.

During the proceedings of the Commission there took place much discussion of the Wehrsport task of the SA. Nothing has been misunderstood more thoroughly than that. The SA has been described by the Prosecution as a semi-military organization of volunteers in spite of the fact that the tasks of the Armed Forces and the SA have been clearly separated. The misunderstanding resulted mainly from the fact that there is no adequate translation of the word "Wehr". Nevertheless that concept should be clarified; for the Prosecution itself submitted document 2471 PS, There it is said, "The SA, the carrier of the Wehrwille. The SA claims to be the carrier of the Wehrwille and of the Wehrkraft of the German people The stressing of these qualities might have led to misunderstandings abroad partly because foreign languages are unable to translate correctly the terms 'Wehrwille' and 'Wehrkraft' but substitute for them the terms 'Kriegswille' or 'Kriegskraft', while correctly 'Verteidigungswille' should be used. Because 'Sich wehren' is a linguistic deviation from Abwehr (Defense). The one who is defending himself in every case is the one who is attacked; and therefore, all allegations of military agressive intentions are perfectly lunatic." Ultimately the Wehrmacht is concentrated trained and conducted force of all men who are able to defend themselves. (Wehrfaehig). At no time the SA had to do anything with that technical military training given in the Wehrmacht. Therefore, the SA athletic badge has been misjudged by the prosecution. It is admitted that it was the purpose of the SA athletic badge to train into "Wehrhafte" citizens. Therefore, it is stated in the first document of February 15, 1935: "The new state demands a generation able to resist and a tough one." In the regulations concerning the execution of the document of March 18, 1937, the following is said:

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"The combat training of the body is not a purpose in itself, but the means to strengthen the German men spiritually and physically, to increase their ability to perform and to make them employable and willing to be employed for the maintenance of the nations up into their high age."

It is also admitted that there exist parallels between the work of the Wehrmacht and the SA. The thought was that the SA would train German men to be a National-Socialist and political fighter, while the Wehrmacht would give him the character and technical training of the man bearing arms; it trains him for the defense of the country. However, it would be going too far to call the SA a military troop. At no time did the SA possess any military value. The SA was nothing but an association whose members counted millions and stepped the same step. It is true that from time to time there were conducted group games in the open but it was prohibited to use military situations as their basis.
The SA man listened to an occasional lecture and, as it it usual in shooting clubs, once every fortnight they practiced with small calibre rifles. That does not permit us to consider the SA a troop, even if every storm should have had a maximum of five small calibre rifles, which, however, was not universally true. At no time did the SA have heavy arms or practice with them.
The relationship of the SA to the Wehrmacht was corresponding. At no time was it recognized by the Whermacht. Rnak in the SA -- no matter how high-- had not the slighest influence on rank in the Wehrmacht. On the contrary it often had the effect hindering promotion. Special training certificates of the SA, such as cavalry certificates, medical certificates, radio certificates were not recognized in the Wehrmacht. It is absolutely comical if we read in affidavits that SA men from engineer units were used in communications regiments and SA men from communications divisions were used in engineering units of the army. May I state in detail:

1) The SA uniform was the most unsuitable uniform imaginable for military purposes. In this connection I refer to the testimony of the witness Bock.

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2) Aside from the small calibre rifles already mentioned, only dagger and pistol were permitted. Moreover, the dagger was introduced only after the year 1933. Only the Sturmfuehrers had pistols and only part of the Sturmfuehrers carried pistols, since only the customary conditions in Germany for the weapon certificate applied.

3) In the SA there were no means of transportation.

4) In the SA there was no storage ground of heavy weapons and no arsenal of hand firearms. Therefore, there could be no training with them/

5) The SA units did not correspond to the military units. The composition and activation was not carried out according to considerations of possible military employment with the exception of the "Standarte Feldherrnhalle", the SA man was not housed in permanent barrcks. The competence of military service (military registry and military district) did not correspond with the assignments of the SA. A "Standarte" (Regiment) in the country, for instance, was split up in many small companies and platoons not fixed in number and not at all comparable to a military regiment.

6) Commands could not be passed on quickly.

7) Maneuvers of military units did not take place.

8) The SA special units did not have military tasks. They had no military equipment, no military value, and no military mission. The SA cavalry companies served the purpose of cavalry and driving sport. The engineer companies served the purpose of emergency accident service. The signal companies had as their tasks the reading of signals with primitive old-fashioned methods without radio service. This was forbidden as can be seen from an affidavit. Moreover, they were working in the field of health service. They received their training in keeping with the Geneva Convention. (Testimony of Bock, Affidavit General SA-90)

9) The so-called Army units "Feldherrnhalle" were not subordinate to the supreme SA leadership as evidenced by the affidavit of the former Major-General Pape. (General SA-13)

10) The SA leadership was not chosen according to military consideration or ability. (Testimony Book). The examination of the defendant von Schirach showed that the SA was unable to carry on military training.

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During the war more than one draft of an agreement was submitted according to which the SA should turn over to the Hitler youth (HJ) persons for training of youth in the military efficiency schooling camps similar to the SS and the police. Documents of USA Exhibit 867 establish that the SA leadership did not grant this request. As reason for this the defendant von Schirach states that the SA was not capable of doing this. The concepts of "Wehrmannschaften" and "SA-Wehrmannschaften" were confused by the prosecution. In the occupied territories the Wehrmannschaften constituted a consolidation of loyal civilian authorities which were generally only concerned with administration, but it the rear areas should become endangered they were to be organized for their own defense. Furthermore, the term "Wehrmannschaften" in the occupied territories also signified local inhanitants such as Lithuanians, Latvians, Estonians or White Ruthenians who also wanted to defend themselves against partisans.

However, the term SA-Wehrmannschaften signifies formation from the Reich area which were to organize, above all, the SA men dismissed from military service of the Army in order to preserve their military efficiency. They were to be a certain substitute for the former veterans organizations.

The English prosecution was kind enough to submit among their prosecution documents an article from the "SA Mann" from which it can be seen what is really to be understood by military training. Probably as a comparison to see whether the SA carried out military training it quotes these articles which deal with the training of the French, Russian, and Italian youth, but also that of the English Dominion youth, as well as that of the French youth. They indicate clearly that the supreme SA leadership did not carry on any such training.

The connecting link between the military trainning of the SA and aggressive warfare was supposed to be a series of articles on the so-called Lebensraum, which the English Prosecution has meanwhile withdrawn, since this series of articles does not indicate what it contends. The articles quoted by the British prosecution on the colonial problem mention only a peaceful winning back of the colonies. As the proceedings before the Commission have shown,

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these articles showed no signs of any war-mongering spirit. Therefore, the leap which the Prosecution makes in order to prove the bringing on of a war of agression by the SA is a leap into empty space. On the contrary, I have shown that the supreme SA leadership did everything possible to contribute to understanding among nations. This was shown clearly by the statements of the witness Oberlindober. I have also shown that at the Fuehrer schools of the SA only an ideological political training was given, but no military training. We see from affidavits that songs which might perhaps have indicated an aggressive tendency were prohibited by the supreme SA leadership. I have shown that individual SA men who tried to preach a war of vengeance were dismissed from the SA.

Finally I have shown that the SA leadership made preparations for the Reich Party rally of 1939, which were contrary to possible war plans. We have also clarified this through the testimony of the witness Dr. Geyer, through the affidavits of Koch, and Zollenhoefer. Finally there came to our attention in the proceedings before the Commission an agreement between the SA and the Wehrmacht, which was to form a counter-balance to possible military aggressive tendencies on the part of Hitler, Himmler and Goebbels. (Affidavit General SA, No. 1.).

The opinion of the Prosecution that the SA was founded in order to overthrow political opponents with terroristic methods and thus make the way clear for an aggressive war is completely misleading. He who knows political conditions and looks at them without propaganda-clouded glasses wonders how one can arrive at such an opinion. The officially ascertained weapon depots of the KPD and the unequivocal attitude of the KPD speak an unmistakable language. (SA Document No. 287). What extent the political struggle of the KPD and the other leftist radical elements, which these organizations carried into the streets, assumed, we can see from the testimony of the witness Bock before the Commission, who proved that the relief fund of the NSDAP had to be founded to care for the NSDAP-victims resulting from the leftist radical terror. May I point out that it was the KPD that considered civil war, general strike, political mass strike necessary political fighting means, as indicated by the

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decision of the state court for the protection of the German republic, which I submitted the Tribunal in the Document Book (SA-Doc. No. 286). That this political terrorism was carried on within the framework of world revolution, is also shown by a decision rendered by the State Tribunal for the protection of the German republic. This the witness Juettner indicated when he referred to the idea of a defensive Western pact directed against the endeavors to bring about a world revolution. It has been proved that this terrorism was, indeed, part of a world revolution. (SA-Document 286), in connection with which, according to their own admission, the Communist International and other agencies began revolutions in Finland, in Austria, in Hungary, in Bulgaria, and in Syria. It may well be said, without fear of exaggeration, that without the Marxists theory of the class struggle, and without the events which led up to it, the foundations would no doubt not have been created which required the protection of a spiritual movement by the SA. This is the view also adopted by the witness Gisevius, when he testifies: "The SA h s its origin in that post-war period, where revolution either still was, or began again to be rampant in Germany. One might say that it was one of the last after-effects of the Spartakus upheavals in 1918. Red pressure produced Brown counter-pressure, and the latter's external expression is called after that: The SA. The Prosecution, for their part, have submitted unequivocal documents of the "SA-Mann" which, although it was not an official organ of the supreme SA-Leadership, it nevertheless contains in this case irrefutable proof showing that terrorism was no doubt practiced by the Communist Party. I do not propose to quote these articles in detail. I merely want to refer to Prosecution Document 3050-PS, which, by the way, reproduces articles from the "SA-Mann," in a distorted way, and torn from their context. (Compare evidence given by Klachn and Bock before the Commission).

COLONEL POKROVSKY: My Lord, the attorney for the defense is trying to attribute to the prosecution, materials submitted as evidence which the prosecution never submitted. I object very definitely against such methods on the part of Dr. Boehm since such met ods seem quite obviously meant to introduce falsehoods before this Tribunal. I plead with the Tribunal not to admit the

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the subsequent paragraph which in the Russian Translation appears on page 29, It is the first paragraph. I would like to draw the attention of the Tribunal, My Lord, to the circumstances that there we have a very clear introduction of a falsehood. It is quite true that the document there mentioned was submitted by the prosecution, but it consisted of a bunch of newspapers for a number of years. In terms of previous decisions of the Tribunal, he should have, if he wanted to refer to that document or to any part of it, followed the example of the other attorneys by referring only to the particular part that he wants to draw their attention to instead of referring to the document as a whole. This he did not do. He attributes to the prosecution submission of material which was submitted only as a part of the document. It is quite different from the document's context. For that reason, I object.

THE PRESIDENT: I do not quite understand your objection. I have a translation before me which says: "The Prosecution also introduced documents taken from the "Associated Press", as was proved at the meeting of theCommission". I understand that was submitted by the prosecution. Is that right?

COLONEL POKROVSKY: Document 3050 PS, on the basis of the text I have, consists of a collection of newspapers for the years 1934 to 1939. Part of the material that has appeared in these newspapers has been submitted by the prosecution. It appears to me that if the defense wants to use materials out of that collection which the prosecution did not submit, but which did appear in the same newspaper, then he should make a very clear distinction.

THE PRESIDENT: At the outset the Tribunal laid down a rule to cover this very situation. It is always the same.

COLONEL POKROVSKY: The prosecution does remember that decision of the Tribunal, My Lord, but we interpreted it in the way I have described here. Our point of view is strengthened by all the preceding work of the defense. Usually up to now when the defense cited parts of a document which were not cited by the prosecution, the defense made it very clear that the part of the document was not used by the prosecution. Dr. Boehm has not done so, although all other attorneys for the defense made that distinction very clear.

DR. BOEHM: May I define my attitude, Mr. President.

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THE PRESIDENT: No.

Colonel Pokrowsky, he does not expressly say it was used by the prosecution. He expressly states to what he is referring. I do not consider it improper.

COLONEL POKROWSKY: It seems to me, My Lord, that such utilization of a document on the part of the defense is not correct. It has not been followed by any of the other attorneys. For that reason I repeat once more, it seems to me he should have stated clearly that he is either citing or not citing parts used.

THE PRESIDENT: The part of the document to which he is referring is a part which was not referred to by the prosecution. So what you desire has been done. Very well.

COLONEL POKROWSKY: Quite correct, My Lord. You are quite right, My Lord, in that case. Thank you.

MR. PRESIDENT: Go no, Dr. Boehm.

DR. BOEHM: Mr. President, in my brief I have merely referred to that part of the document not submitted by me, but my the prosecution, 3050. To take individual articles out of its contents would be equivilent to the work of at least a whole day as the Commission hearings have proved. There are a number of individual articles contained in Document 3050. But as far as I am concerned, there was no cause whatsoever to give them numbers because I did not present them. I do not think I have committed an act here which it was my duty to commit or not commit.

May I carry on?

THE PRESIDENT: Yes. Go on.

DR. BOEHM: The prosecution also introduced documents taken from the "Associated Press", as was proved at the meeting of the Commission, in which the political struggle is described in connection with World revolutionary tendencies. I merely want to recall here the article entitled "The Red Danger in the East", and the cartoon under the caption "Stalin wants world revolution, Buljonny is already smelling the roast". This article was introduced by the Prosecution. Finally, I want to draw the Tribunal's attention to the street

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fighting regulations issued by the Communist Party.

In contrast to this, I would like to mention the general order issued by the Supreme SA-Leadership, which prohibits weapons of any kind in the SA, and threatens to punish any infringement on this regulation with expulsion from the SA. I may also be allowed to refer, in this connection, to the evidence given by the witness, Dr. Kurt Wolf, who explained that this prohibition to carry arms was the reason why the number of victims among the SA people was so unproportionately high. The witness also said that the number of dead on the part of the National Socialist Party was higher than the corresponding figure of the Communist Party. He also explained that the members of the SA, unlike those belonging to the radical left, were invariably searched for arms by the responsible leaders. I amy also refer in this connection to the affidavits given by Freund, Zoeberlein and Hahn. They represent the political situation as it really was, beyond any doubt. That before 1933, civil war was imminent, was clear from many of the testimonies. The excesses which actually occurred in 1933 find their explanation in this atmosphere of Civil War. This is also shown by the evidence of the former States Secretary Grauert. Herr Gisevius says about this period, as I explained in the SA Document 301, "looking back on these events, one may say without fear of making a mistake that this first phase of the revolution cost comparatively few victims". If we look at Document SA 302, he also admits that "fundamentally it was only a very small clique which rendered itself guilty of excesses." In his testimony before the Tribunal, he consequently excepted more than once the great mass of the SA. It was quite clear, also, from various testimonies that the Supreme SA Leadership intervened when ever excesses were brought to their knowledge. That this was actually the case, is clearly shown by the matter concerning Vogel, and above all, by the testimony of the former police president Habenicht on the camp near Wuppertal. In close cooperation between Grauert and the Supreme SA Leadership, elements committing excesses were eliminated. Herr Diels who is a Prosecution witness limits the number of those concerned in Berlin, in his affidavit on the SA, to the signal detachments which had grown out of Ernst

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Group Staff. On the other hand, we also know from the summary collection of affidavits that the notorious SA leader, who had the nickname "Schweinebacke", pig's cheek, was expelled from the SA for blackmailing a Jew, and sentenced to a long term of imprisonment. The testimony given by Burgstaller and Juettner make it clear that the SA did not adopt an extremists attitude in the racial question; because otherwise, it would have been impossible for baptized Jews to be admitted to the SA in Berlin, and that Jews were baptized in the presence of uniformed SA men. The testimony given by Diels shows that the SA of Berlin was not anti-Semitic.

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He emphasizes that anti-semitic propaganda was Dr. Goebbels' business. We have also Dr. Mengo's testimony according to which Jewish businesses at Hanover were protected by SA detachments, the Jewish shopkeepers supplying the members of the SA in return with purchase coupons supplying the members of the SA in return with purchase coupons (Affidavit General SA No. 1). We furthermore see from the summary collection of affidavits that in other cities as well houses and businesses of Jewish citizens were protected by SA members from looting. The witness Juettner told us that the attitude adopted by the supreme SA leadership in this matter coincided with that of the well-known Jewish professor Karo who criticized the Eastern Jewry. These manifestations of hostility to Eastern Jewry are the consequences of the first World War, when innumerable Jews from Galicia infiltrated into Germany.

The events connected with the 9th of November 1938 are among the most essential incriminating points for the SA. The alleged report of the leader of the Kurpfalz Brigade plays an important part in this connection. It results from the circumstances in which this alleged report on the execution of instructions (1721-PS) was made that the whole document can only be a fake, and a bad one at that. To prove this we mentioned the witnesses Lucke and Fust, who could not be transferred to Nurnberg in spite of the endeavors of the Secretary General extending over a period of several months, although the defense had indicated the camps where they are interned. In point of detail the following may be said: --

THE PRESIDENT: Dr. Boehm, that is an improper observation, or suggestion, for you to make. Every effort has been made by the Secretary General to obtain all the witnesses whose names have been given, and there is no evidence that the witnesses were in the camps that you are referring to.

Now you may go on.

DR. BOEHM: In point of detail the following may be said: -- and I am here defining my attitude toward Document 1721-PS:

1) It has never happened in the correspondence of the SA that a report on the execution of orders repeated the order in its substance;

2) The order of the Fuehrer of the Kurpfals Gruppe reads, according to the Prosecution, "By order of the Gruppenfuehrer". If an order had been

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given, it would have read: "It is ordered", or "The Gruppe orders"; in no case, however, can it be "By order of the Gruppenfuehrer".

3) The expression "Jewish Synagogues" does not exist in German. Nor does this expression "Jewish Synagogues" exist in official party intercourse. The term "Jewish" is embraced in the word "Synagogue". The term "Aryan" in this connection is likewise out of place. If the order were authentic, then in contradistinction to "Jews" at this point it would have spoken of "German compatriots".

4) "Riots and looting are to be avoided", it continues. The conditions in Germany in 1938 were such that no one, and certainly no Fuehrer of a Gruppe or a Brigade, would have thought of such disturbances, much less of using these words in an order in this connection.

5) "Report on completion of a mission by 8:30 o'clock to the Brigade fuehrer or Local Office", it says in the ostensible order.

In no case does the Gruppe order a report on completion of a mission to the Brigade, which is receiving the order, but only to the Gruppe. Logically, it should have said "to the Gruppenfuehrer".

6) It is equally improbable that the Fuehrer of the Brigade did not pass on the order or give orders to the Fuehrers of the Standarten on his own initiative, but only "Immediately informed the Standartenfuehrers and gave them exact information".

Page 35 - Such romantic reports on the completion of a mission never existed in the SA.

7) It says in the report, "And execution was immediately begun." This formulation is also completely improbable. The Fuehrer of the Brigade reports in the preceding sentence that he immediately informed his Standartenfuehrers. It would then have been a matter of course, which no SA Fuehrer would have mentioned in his report on the completion of the mission, that the carrying through -- not the carrying out -- of the order was immediately begun.

In the examination of the witness Juettner the Prosecution wanted to save the document by alleging that the stamps on the Juettner letter (1721-PS) and on the report of the Gruppe (1721-PS) were identical. These two documents were presented under the same PS number. It was established,

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however, that the written notations were by different persons.

THE PRESIDENT: Shall we break off?

(A recess was taken.)

DR. BOEHM: Mr. President, Your Honors, I just spoke of the points which were presented to refute the generalness of the document 1721-PS. I continue.

This alone would not be conclusive if I did not have the affidavit of the Gruppenfuehrer of the Kurpfalz Gruppe, Fust, and the member of the Gruppe staff Zimmerma[illegible], who was present at the time, which testify that such an order as the Prosecution contends was never given. If such an order was never given, then there can be no report on the completion of the mission. But it is, in addition, proved, on the basis of affidavits of the collective digest, that no order in the sense which the Prosecution contends was issued to the Standarten of Brigade 50.

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This we learn from the Standarten 115, 221, 186, 168 and 145. All these standards were part of Brigade 50. None of them received such ominous orders as the prosecution has claimed. By the evidence given by the former Obergruppenfuehrer Happes, it has been proved that Lutze issued counter orders against the order of the 9th of November 1938 of Dr. Goebbels. Thus it has been proved that the Supreme SA leadership prohibited the participation in the undertaking started by Goebbels. It has been proved that without any doubt that counter order reached the following groups: East Prussia, Mitto, Hochland Hessen, Niedersachsen. (Affidavit General SS No. 71.) As shown by the testimony of Siebel, Lutze prohibited, as a consequence of the happenings of November 9, 1938, the carrying out of future orders of the political leadership. He issued that order because he realized that various SA Sturms or SA members had been abused at the occasion of November 9, 1938. (Affidavit SA No. 80).

If excesses should have occurred in which members of the SA participated, they render no tools for the sentencing of the SA as criminal. Since we have the counter order of Lutze, those events do not find themselves within the framework of the SA.

From the sworn evidence of Edgar Stolzner (Affidavit General SS No. 89), we learn that individual SA leaders detested those occurrences. By that, many SA units kept their records clean. There are whole districts in which nothing took place.

In the statistical collective summary of the affidavits, I have shown that the following synagogues were protected by members of the SA: Bebra, Hoechstedt, Weilburg, Saubern, Grossumstadt, Bueckeburg. Furthermore, attempts to save the synagogues were made in Marburg, and in Giessen by SA members. It must be added that the largest part of the rural districts had neither synagogues nor Jews. In those districts no persecution of Jews was carried out. Therefore, the rural SA without further ado is to be excluded from this point of the indictment. It appears superfluous to me to emphasize that those excesses were rejected by the overwhelming majority of the SA members.

How the SA leadership considered the Jewish question will be learned from the differences we spoke about which the SA leadership had with the editor,

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and the Eher Publishing House in regard to those articles in the "SA Mann" when it opposed them but lacked the power to prevail. This position in regard to the Jewish question is completely clarified by the fact that in various groups the SA leadership had expressly prohibited the "Stuermer." This was the case, for instance, in the group Nordmark (Evidence Klaehn, and Juettner).

Particularly consistent is the position taken by the Supreme SA leadership in regard to the church question. The evidence given by Generalvikars Dr. David, Pastor Burgstaller, and Konsistorialrates Dr. Rathke demonstrates that the prosecution charged the SA without justification with religious intolerance. The by far overwhelming majority of all SA members still belong to one of the Christian churches.

Protestant clergymen served within the ranks of the SA; for instance, the Bishop Sasse of Thuringia. From that, one may conclude that the SA leadership did not exert any pressure to have people leave the church. This fact is unmistakably proven by many affidavits. I may recall that Cardinal Count Galen was accompanied on his trips through the dioceses by SA members, and that in many territories an order had been issued prohibiting SA service during church times and in the neighborhood of churches. It is also a known fact that the SA held divine service in the field. In 1933 the SA furnished the guard of honor when the holy frock was exhibited in Trier (Testimony of Dr. Davis). In the cross examination of the witness Dr. Davis, the defense has proved that in the famous case in Freising when the sermon of Cardinal Faulhaber was to be monitored, the SA leadership initiated proceedings to punish those who were guilty of those excesses.

In regard to the activity of the SA in the framework of the concentration camp guards or the police and assistant police troops, the prosecution mentions only a few cases. By that, the SA is excluded even through the indictment of the charges, of having had any connection with the large concentration camps of Auschwitz, Maidanek, Bolsen, Dachau and Buchenwald. In the case of Vogel the guilty person was punished. The misunderstanding created by the affidavit Schellenberg was cleared up by the affidavit of Gontermann (Affidavit General SA No.16). Shcellenberg in London confused the concentration camp and police service with the employment of the town and country guards.

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It is true that after January 1st, 1933, in a number of states various policemen and auxiliary policement were employed for various purposes. They were taken from the ranks of the SA.

a) Because it was desirable to have a certain political proof of reliability:

b) Because among the many unemployed in the SA, there were to be found candidates for the profession of policeman or the work of auxiliary policeman.

As far as the respective SA members selected a new occupation; for instance, that of the policeman, these were only men who actually carried out that vocation. As far as they worked temporarily as auxiliary policemen, which was the case frequently when they served on probation before being definitely employed as policemen, they were not any longer subordinate to the SA but to the competent police office. At times they stillwore the SA uniform; but only because there were not enough uniforms; and therefore they wore an arm band "Auxiliary Police." They received an identification card issued by the police, the Landrat, or other authorities. For the duration of such employment, they received furloughs from the SA by which the SA externally separated itself from them and deprived itself of the possibility of issuing orders to them. In tsuch cases the individual, therefore, never acted as SA man. The uniform which he kept wearing with the arm badn was the sole exclusively external connection with the SA, which cannot alone prove decisive. This adoption of the uniform of an organization for a purpose and service alien to the organization occurred frequently in the SA and other organizations; for example, as Wehrmacht affiliates or as Volkssturm. The arm band gave the uniform, or even civilian clothing according to recognized international law, the sole mark of the new service, deviating from the original purpose of the SA.

The charges against the SA, in connection with concentration camp, police, and auxiliary police service, can deal only with such purely superficial matters, which can be unjustly charged against the SA only on the basis of the uniform. For the orders were issued, not by the SA leadership, but by the state.

The Prosecution tried to refute this argument in the cross-examination of Juettner by introducing documents which were to prove that the SA had

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participated in the atrocities in the occupied territories and in the concentration camps and forced labor camps.

They did not succeed in this.

It was clearly established that the supreme SA leadership was forbidden to set up SA units in the so-called ReichskommissariatOstland; that is Lithuania, Latvia and Estonia. The Prosecution is confusing here the SA Gruppe Ostland which was set up in East Prussia with the later Reichskommissari Ostland. Moreover, the Prosecution has already charged another organization with the Schaulen, Kovno, and Vilna cases. District Commissars, Provincial Commissars, and officials of the Reichskommissariat Ostland were no more under the supreme SA leadership than the SA Obergruppenfuehrers, Killinger and Kascha who were engaged as ministers. The defendant Ribbentrop has explained this clearly. The affidavit of the defendant Frank has solved the Ilkenau case in favor of the SA.

A special role in the cross-examination of Juettner was played by the so-called abuse of justice, which Sir David emphasized. It is not the affair of the SA but rather of the competent ministers.

Moreover there came to the fore the case of the Concentration Camp Hochnstein. In reexamination it could be proved that this concentration camp was not a concentrati n camp for political opponents alone. Old political fighters were inmates of it. Moreover the affair of the Concentration Camp Hohenstein came to be pros cuted by the officials of the Ministry of Justice through information supplied by SA Obergruppenfuehrer Killinger, when he was still in charge of the SA Gruppe Sachsen. It is a curious thing to charge the SA with cases that they themselves reported for punishment. It is interesting in this connection that the Prosecution submitted an incomplete document in which theletters of Lutze and Hess are lacking, from which the SA defense might have been able to derive something favorable according to the information which it received.

In order to be able to prove the criminal character of the SA, the Prosecution obtained affidavits from former political opponents of the NSDAP. Among them are the affidavits of the Minister President Dr. Wilhelm Hoegner, and Advocate General Dr. Staff von Braunschweig. They were deposed on order of the Military Government, as can be seen from the affidavit of Dr. Staff.

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The two latter ones were submitted by the Defense. It has already been established before the Court that Dr. Hoegner was frequently mistaken. His description of the March on Coburg is completely wrong.

In reality, things happened in the following way, as testified by witness Juettner and the affidavit of Zoeberlein (Affidavit General SA No.2):

A German Association, the "Schutz-und Trutzbund" was obliged by the Town Administration to hold a closed session. The NSDAP stressed the right of freedom of assembly which was guaranteed to all by the constitution. Therefore, a protective group went to Coburg. When leaving the railroad station, it was attacked on the street by members of Leftist organizations who were equipped with lead tubes, nails, wooden boards, etc. Above all, it has been proven, too, that the observations of Dr. Hoegner that the SA was trained by the Reichswehr were incorrect. The Munich Reichswehr General von Lossow frustrated the success of the Hitler Putsch. As Witness Juettner has testified, the collections of arms which had been opened with the permission of the Inter-allied Commission were opened to all other organizations with the exception of the SA. It is equally wrong when it was contended that Ludendorff was chosen to unleash a national war against France at a time when Communist outbreaks were raging in Saxonia and when Ludendorff had already tried in 1921 to reach an understanding with France, which led around the end of 1923 to the so-called Foch Plan. When we consider the source of arms in Munich, Dr.Hoegner claimed that the SA had had a share in the persecution of the Jews while the witness of the prosecution, Diels, stressed that the SA was not anti-semitic. Dr. Hoegner puts himself also in contrast to Pastor Burgstaller who had emphasized the indifference of the SA in racial matters. Without any qualification, it can be admitted

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that excesses did occur when the "Munich Post" was occupied. But such things occur during any revolution; we should only remember some of the things that happened between 1918 and 1920.

How the situation actually was, objectively seen, is shown by the affidavit of Dr. Staff, Braunschweig. There it is stated; the SA behaved in a manner which from the legal standpoint of a civilized nation must be called illegal, but it did not result in any excesses going beyond those illegal measures.

I submitted also an affidavit of Dr. Prioso as Number General SA 82. It shows that Dr. Prioso as a member of the Communist Party of Germany is active as an expert of the de-nazification court, and that he testified with the approval of the Minister for political clearances. His judgment says that the SA could not be considered a criminal organization in the sense of Article VI of the Charter.

By the mass enlistment of members into the SA after January 30, 1933, the so-called uniform unit of the NSDAP broke into pieces even more than it had been the case before that date. Part of the German populace entered the SA who had nothing to do with the aims and purposes of the SA.

The affidavit of Diels shows that for instance in the Berlin SA, Communists were incorporated in large numbers. The collection of affidavits shows that this was also the case in other cities. It is also necessary in this connection to refer to the incorporation of all evangelical youth organizations in the Hitler Youth in 1933, which were later transferred to the SA. Generalviker Dr. David declared that this was also the case among many of the Catholic youth. The idea which leading personalities had in their minds when this transfer was made become clear from the quotation from the Akademischen Monatsblaetter of June 1933 (SA Document 317), which reads as follows: "Having recognized this it is up to us to take a hand in order to creat new and better things and to prevent the worst. In common honest work with all constructive forces of our nation, and with a sincere conviction. For this reason we want to place all our Catholic property of Christian conservative ideas

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and our Christian evolutionary forces into the new Germany to help in the formation and deepening of its spirit from our spirit."

If the SA were to be condemned its definition as a criminal organization would also involve those men who were not in the least concerned with the spirit of the National Socialist Party, and many of whom were to act as a brake against the extremists of the movement.

The greatest number of men joined the SA as a consequence of the transfer to the SA of the Stahlhelm according to orders in 1933 and 1934. The original so-called Tradition-SA had had only 300,000 members as this was stated some time ago. The Stahlhelm, on the other hand comprised more than one million members who distinguished themselves considerably from the SA men of the fighting period both as regards their general attitude and their conception of life.

At the court session of February [illegible] to March 2, 1946, the prosecution moved to except among others the SA reserve from the declaration of criminality.

By an order of the supreme leadership (Hitler) dated November 6, 1933, the SA-Reserve 1 was formed from members of the Stahlhelm between 36 to 45 years of age. The SA-Reserve was subsequently placed under the command of SA-Gruppenfuehrer in accordance with a directive issued by the same authority on January 25, 1934. It was transferred to the SA under the designation SA-Reserve No. 1 (Exhibits No. 13 and 17 of the Document Book Stahlhelm-SA). Part of the SA-Reserve 1 was maintained up to the end of the war and has thus been excluded from the declaration of criminality. A further part of this SA-Reserve No. 1, was attached in the shape of small reserve groups to active SA-Stuerme in the course of the last few years. The remainder was gradually incorporated in the active SA after 1934. Such re-groupings were carried through either in accordance with lists or under specially issued orders. The reason for these transfers were partly due to technical considerations, like local re-groupings; above all during the war, when SA-Stuerme shrank as a consequence of inductions of their members into the Armed Forces. In many cases these re-groupings were also made in order to improve control with the SA.

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It would thus be unfair and incomprehen ible to give this latter group a different treatment than the former, to make coincidence the judge over the fate of the members of the Stahlhelm who remained in the SA up to the end of the war.

Those members of the Stahlheml cransferred into the SA by order of Hitler in 1933-1934 were transferred to th SA cumulatively. For that reason alone and according to the decision of the Tribunal on the 13th of March, 1946, under 6-a 2, and 6-b, they cannot be declared criminal. With reference to this I draw your attention to the plea of my colleague Atterney Klefisch on the 15th of August, 1946.

It is explained therein that thos persons who had reached an organization involuntarily belonged to the circle of guiltless followers and that it is to be assumed of them that they did not desire to support the aims and activities of the organization. The ac sation of guilt cannot apply to them, therefore, even if an early resignation of their membership had been possible for them.

The above-mentioned transfer took place as follows: On the 27th of April, 1933, the entire Stahlhelm was placed under Hitler's orders by the leader of the organization, Seldte. On the 21st of June, 1933, the Jungstahlhelm and on the 4th of July, 1933, the entire Stahlhelm was subordinated to the Supreme Command of the SA by order of Hitler. According to the decree of the 4th of July, 1933, the Jungstahlhelm and the Sports Units, later called Wehrstahlhelm, i.e., Stahlhelm members up to the age of 35 years, were included in the active SA (Exhibits 1, 6, 7). The transfer of the original Stahlhelm, i.e., members of the ages of 36 to 45 years, took place as I have mentioned on the 25th of January, 1934. This transfer and inclusion both in the case of the Wehrstahlhelm as the original Stahlhelm took place without the members's being asked partly through acce ncing the orders on parade, partly by handing over nominal roles and partly by delivery of pre-dated membership books of the SA. This is proved by the affidavits which I have presented and the testimony of Von Waldenfels, Hauffe, and Gruss.

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The instructions issued by Hitler after the 1st of December, 1933, (the law regarding the uniformity of the State and the Party) are without doubt to be regarded as lawful instructions. The preceeding orders and instructions in practice have a similar character and were sanctioned by law of the 1st of December, 1933, as well as later instructions and executive orders.

The transfer of the Stahlhelm did not take place without friction. In the case of many members there was the picture of coercion. Large circles of the organization did not agree with the subordination of the Stahlhelm or the cooperation of the Stahlhelm in the seizure of power. Duesterberg objected particularly, who must be regarded as the head of the opposition to Seldte's policy. His arrest was the result of the attitude he adopted as well as were numerous arrests of Stahlhelm members carried out by the State Police in the spring of 1933, particularly in Brunswick.

Members of the Stahlhelm who did not obey the order for the transfer were forced by organs of the State to do duty and were occasionally punished (Affidavit 1, 3, 2, and testimony Hauffe, V. Waldenfels.)

Just as the SA disintegrated because of the events before and after 1933 through the influx of people with the greatest variety of aims, so this also applies to the Stahlhelm because of the events of the year of 1933, which had such serious and dreadful consequences for the German people. The Stahlhelm disintegrated. For some of its members it had been of importance that at the time of the transfer they had been expressly assured of a certain amount of independence under their own leaders and with their existing uniforms, as well as further connection with the Stahlelmbund. This is shown by nearly all documents, affidavits and testimonies. When these assurances were not put into practice the resistance of the opposition group against Seldte increased. The national socialist leaders of the State considered this group to be politically unreliable and reactionary.

This also is confirmed by affidavits and the testimony of witnesses, and particularly the newspaper reports which I have submitted which represent only a small portion of similar reports. Evidence: Exhibit 32, 33, 35, 36, 37,

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39, 40, 48, 51, 53, 54, 55. In the National Socialist paper "Rheinfront" the statement appeared on the 27th of July 1935 "in its innermost character the Stahlhelm was never National Socialist." Another paper wrote on the 30th of July 1935, "With certainty the Stahlhelm could always be found wherever were the opponents of the movement." Another newspaper on the 8th of August 1935 described the Stahlhelm as the "boiling pot of oppositional and reactionary forces".

It should be noted that the majority of the members of the Stahlhelm transferred to the SA retained their membership in the Stahlhelmbund or the later so-called NSDFB. According to the decrees of 14 July 1933 and 27 January 1934 (Exhibit Nos. 8 and 18) members, transferred to the SA, were expressly permitted this dual membership. Finally, I draw your attention to Exhibit No. 21. According to this the Press Department of the supreme SA command announces on the 25th of April 1934:

"That members of the former Stahlhelmbund, who have already been put on the strength of the SA-Reserve are not at present allowed to be taken off the strength of SA-Reserve I."

A large number of the members of the Stahlhelm represented a body within the SA, drawn together by common ideals, who regarded the events of the time with the greatest distrust. Opposed to them there was a group of Stahlhelm members and former Stahlhelm leaders, headed by Labor Minister Seldte, who affirmed the national revolution and who had furnished sixty high and higher SA leaders, but who nevertheless disavowed perpetrations and excesses in the severest possible manner. Two spokesmen of these two Stahlhelm groups have been heard before this Tribunal, namely, the witnesses Gruss and Juettner. One witness stood in the midst of the SA, the other was not an SA member. One member of the Stahlhelm affirms the SA which he knows intimately, the other, placed outside the SA, regards it with a negative attitude. The latter is the exponent of that section of the Stahlhelm which, until the end of the Third Reich had toyed with oppositional thoughts.

It can be said, without doubt, that the Stahlhelm can be considered an

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element of opposition to the so-called "Old Fighters " of the SA. The above mentioned affidavits, Exhibits and testimony are irrefutable proof of this.

The Stahlhelm members took their ideology into the SA which, in its important points, differs from national socialism. Politically speaking majority of them disagreed with the totalitarian claims of any political party and the Fuehrer principle. As before, they remained in constant touch with their own Bund which, until its being dissolved in 1935, continued to exist under the name of the NSDFB (Stahlhelm). Even after it was dissolved homogenous groups formed themselves who held together firmly and had meetings of comradeship all over Germany. In many of these groups the hope of a political reaction continued to live for a long time.

As in other sections of the SA former opponents of National Socialism, particularly Marxists, joined the ranks of the Stahlhelm. So, for instance, the Stahlhelm at Brunswick joined the Reichsbanner (D-947).

The insufficient camouflage of the activities of the Reichsbanner men caused its being dissolved.

Those members transferred from the Stahlhelm to the SA, like SA members, adopted a negative attitude regarding the commission of crimes under Article 6. As ex-servicemen they disliked war, most of all, aggressive war.

Considering the transfer of the Stahlhelm it must be taken into consideration that it took place at a time when there were arguments with, and a weakening of, the SA, and at a time when the task of the SA connected with the seizure of power had already been completed, and not at a time when Hugenberg, Schacht and Hitler had formed the so-called Harzburg front. The completion of this transfer to the SA took place at a time when the SA was totally without significance.

May I finally remark, with reference to the subject of the Stahlhelm, that based on coercion, i.e., an order, 500,000 members of the Wehrstahlhelm, and approximately 500,000 members of the Kernstahlhelm were transferred. There remained a further half million of Stahlhelm members over 45 years of age who did not reach the SA at all because an order for this transfer was lacking.

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Only in very few districts were these older-age groups also transferred to the SA because of independent orders issued by subordinate SA agencies.

Another group occupying a special position in the SA is the Mounted SA, the so-called NS Reiterkorps. In accordance with the definite results of the taking of evidence the NS-Reiterkorps possessed, during the period of its existence, far reaching organizational independence. The aims, purposes and activities of the NS-Reiterkorps were not political, but were limited to athletics with horses, the breeding of horses, and the care of horses.

During the elaborate taking of evidence before the Commission, the prosecution did not succeed in showing the participation of the NS-Reiterkorps in any crimes against peace or humanity.

Since the evidence speaks so clearly in favor of the NS-Reiterkorps, I limit myself to summarizing the essential points before the Tribunal.

The charge directed against the SA to have participated in the seizure of power by the NSDAP does not concern the NS-Reiterkorps at all because it was created only after the seizure of power. The NS-Reiterkorps did not grow out of the storm troops of Adolf Hitler, but out of hundreds of so-called rural rider associations, which were popular throughout all Germany up to 1933 as entirely unpolitical athletics and breeding associations. When the rural rider associations were incorporated into the SA after the seizure of power in the course of the so-called "coordination", this was not done voluntarily. It was carried out in accordance with decrees of the authorities against the inner resistance of most members of those associations. That decree by the authorities resulted from negotiations between the Chief of the rural rider associations and the Chief of Staff of the SA, which took place upon request of the Reichsministry of the Interior in the summer of 1933. Those rider associations which resisted the decree were threatened by dissolution and if they actually did resist, were dissolved as a matter of fact.

Since those associations constituted an agricultural necessity, most of the associations obeyed the decree under the compulsion of circumstances.

Even after the absorption of the NS-Reiterkorps by the SA it retained until the very end its independent character of an organization. The former

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rider associations which now called themselves SA rider storms formed jointly the NS-Reiterkorps, headed by the so-called Reichs Inspector fuer das Reit - und Fahrwesen, Litzmann, in Berlin.

As far as the size and composition of the NS-Reiterkrops are concerned, the taking of evidence has shown that it counted approximately 200,000 members. Eighty to ninety per cent of them are farmers who hold horses. After the seizure of power in many cities the riders clubs joined the NS-Reiterkorps, clubs which had up to then, led an entirely unpolitical existence devoted only to sports.

The activity of the NS-Reiterkorps was in accordance with its athletic and breeding tasks. Service consisted in riding and driving and the training in those fields of knowledge relating to horses. In the center of activities stood for the units in towns, the carrying through of hunting and of tournaments as they are staged by riders clubs everywhere in the world. As a rule riding was done not in uniform, but in civilian clothes. The wives and children of the members participated in it. In rural areas the activity limited itself mainly in training the farmers in regard to all problems important to the horse, as driving and the medical treatment of ill horses. Therefore, the members of the NS-Reiterkorps considered themselves everywhere in Germany first of all, as riders, and not as SA men.

Conscientiously the NS-Reiterkorps refrained from giving any political support. It did not spread political propaganda nor give any political training. It never was a political fighting group.

There were in the NS-Reiterkorps practically no "old fighters". Political fanatics and activists were not tolerated by eliminated. Decisive for the position of leaders and the promotion in the NS-Reiterkorps was not political activism but exclusively the capabilities as rider and the noble character.

The taking of evidence has clearly shown that the Reiterkorps in no way participated in any crimes against humanity. It did not have a share either in the excesses against churches, Jews, labor unions, foreign laborers, or prisoners of war. No, members of the NS-Reiterkorps have even in many cases, taken an active part in favor of those who were politically persecuted.

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As the presentation of evidence has shown, the NS-Riding-Corps had no anti-Semitic attitude. In the country close business relations with the Jewish horse-traders existed for a long time after 1933. The NS-Riding-Corps was always religious-minded. It is a significant fact that the non-Aryan Fuldauer, as is shown by his affidavit (No. 20), was a co-founder of the NS-Riding-Corps at Wiehl/Rhineland, and that he belonged to the Riding-Corps there for quite a long time after the seizure of power as a leading member. The Jewish direction of the firm Tietz in Cologne even granted prizes for SA-Riding-Tournaments to the NS-Riding-Corps in view of the existing good relations.

Since the NS-Riding-Corps stood aside from the party, it even became a haven for the politically persecuted in many areas of Germany. Numerous freemasons, non-Aryans were members of the NS-Riding-Corps, and tried to protect themselves by pointing out their membership in an NS-organization. Under these circumstances it is not surprising that the NSDAP, as has been shown by the presentation of evidence, regarded the NS-Riding-Corps with the utmost suspicion. Members of the NS-Riding-Corps were refused membership in the NSDAP because their activity in the NS-Riding-Corps did not give proof of their political reliability.

The results of the presentation of evidence clearly show that the NS-Riding-Corps did not participate even in a crime against the peace.

According to the claims of the Prosecution Hitler is to have ordered the Riding-SA to secure riders from the new generation for the German armed forces. The Prosecution supports itself here above all on certain propaganda material which has appeared by an unknown author in the journal "Der SA-Fuehrer". All witnesses who have been heard with regard to the Riding Corps have testified that the contents of the editorials were in glaring contrast to the actual conditions. It has been repeatedly determined in the course of these proceedings that the party-leadership permitted itself to be directed solely by propagandistic viewpoints. The Prosecution has not succeeded in showing even one actual case where the NS-Riding-Corps in more than 10 years of its existence ever planned or carried out any activity, which can be considered as a preparation or support for an aggressive war.

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The highest head of the German cavalry in the time prior to the outbreak of World War II, the well-known Lieutenant General Guderian, has taken an unequivocal stand on this question. I quote:

"No military collaboration existed between the German armed forces and the NS-Riding-Corps, neither in a tactical nor a strategical respect. The cavalry of the armed forces trained the next generation of riders itself and was not dependent on the collaboration of the NS-Riding-Corps. Relations to the NS-Riding-Corps in this direction were neither sought for nor engaged in by the armed forces....."

Lieutenant-General Guderian gives the convincing reason in this connection:

"Whereas in 1935 18 cavalryregiments were still in existence, only one cavalry brigade existed at the outbreak of war which later in the course of the war was increased to a cavalry division. The armored force had taken the place of the cavalry, already expressed by the fact that 40% of the armored officers came from former cavalry-regiments. In view of this development, an incorporation of units of the NS-Riding-Corps into the armed forces was not intended, not did it ever take place."

But also within the Riding-Corps no training of any kind for military tasks was practiced. At no time and in no part of Germany were cavalry manoeuvers ever carried out by the Riding-Corps in the sense of the Cavalry of the armed forces. The activity was rather limited to the breeding of horses, important for the peasants, and the riding-sport which is practiced in all countries of the earth.

Nor can the charge be maintained with regard to the so-called Riding-Certificate. According to its text, the Riding-Certificate gave its owner the right to be allowed to serve with a mounted unit in the army. This Riding-Certificate, however, could be obtained by any sportsman, even if he was not a member of the NS-Riding Corps. This corresponded to the comprehensible wish of every passionate rider to be assigned to a mounted unit in case he is conscripted for service in the army, just as an enthusiastic mountain-climber or ski-driver will give his first preference for his service in the army to the mountain-units. In practice, however, this wish was

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considered by the armed forces only on the rarest occasions because the armed forces, after all, were almost completely deactivating their cavalry since 1933. Therefore, most of the holders of Riding Certificates were in reality assigned to infantry or motorized units at the time of their induction.

Furthermore, obtaining the Riding-Certificate was not the aim of the sports-activity of members of the NS-Riding Corps, but obtaining the Riding-Badge which was worn by every rider with pride. This badge has been submitted to the Tribunal in its original form and it probably is the only insignia of an NS-unit without the swastika.

The militaristic spirit was not nurtured in the NS-Riding Corps. The large mass of the NS-Riding Corps consisted of peasants. It is well-known that the peasant by nature is not a friend of war. The urban units of the Riding-Corps engaged in close international relations with all countries practicing the riding-sport until the outbreak of war.

Numerous foreigners, partly in official positions, were constant guests of the NS-Riding Corps. At the outbreak of war general consternation reigned.

As regards the character of the General SA, the members of the National Socialist Riders' Corps were of the opinion that the SA, to which the NS-Riders' Corps was not attached until after 1933, had no criminal character. so far as excesses occurred within the General SA, the members of the NS-Riders' Corps must have perceived that these excesses by individuals were not in accordance with the program of the SA and they heard with satisfaction that the SA-Leadership disavowed these questions and tried to avoid repetitions.

It is also pointed out that not one of the chief defendants was ever in any kind of relationship with the NS-Riders' Corps. No member of the NS-Riders' Corps played a leading political part during the National Socialist regime.

Justice demands the exoneration of the NS-Riders' Corps of the charges raised, for the mere reason that both of the other large sports organizations of the Party, the National Socialist Motor Corps and the National Socialist Flying Corps, were justly not indicted, because of their sporting aims. Thanks to the political influence of their leaders in particular the NS Motor Corps and the NS Flying Corps succeeded in achieving complete independence from the

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SA. During the whole period of its existence the NS Riders' Corps also strove to obtain this complete independence, but attained it only in part. In its leadership it remained under the command of the SA. No complete independence was given to the NS Riders' Corps for the reason that the Party leadership did not consider it politically reliable.

A condemnation of the NS rider corps would, under these circumstances, seem to be a grave injustice, quite apart from the fact that the reproach of preparing for a modern war should rather apply to those who were trained in motor vehicle driving or airplane flying than to those who devoted themselves to horse driving and breeding.

A further group within the SA which had still less to do with political aims than the SA riders is represented by so-called medical units.

In the establishment of these the pressure of legal compulsion made itself strongly felt. Legal compulsion means that, based on the provisions of a law there exist decrees or statutes making service in an organization, for instance in the SA, compulsory. It applies to the greater portion of the so-called SA doctors. This is seen from the affidavit of Dr. Carrie (Affidavit general SA No. 74). In his affidavit it is stated that when the doctors refused service in these units, they were dismissed from the municipal services.

Moreover, who can find anything criminal in their activity? Their task consisted in training for first aid in case of accidents, in installation of medical aid stations and in sanitary service in case of catastrophies, as well as attending sports events.

The entrance of a doctor into the SA occurred in his capacity of doctor, mostly with the rank of Sturmbannfuehrer, or at least that of Obergruppenfuehrer. The doctors in the SA were, up to the Groups, activein all the offices of the SA in an honorary capacity. As time went on a "Sanitaetssturm" was established in every SA "Standarte" which on the average comprised 100 members.

From the ranks of the medical units trained SA medical men were, in general, continuously dispatched to the individual SA units. It was practically arranged for each unit to have about 4 - 5 SA medical men. The training of the SA medical men was conducted by physicians within the framework of the Geneva Convention. Part of the medical men were even trained directly by the Red Cross. The duties of the medical personnel corresponded to a large extent to the duties of the Red Cross.

The affidavit of Dr. Menge, Hanover, states that a great number of water-sport-classes were taken over by order of the SA naval-SA stormtroops.

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These naval-SA-units differed from other SA units in that hardly an old fighter was found in their ranks. They are altogether an organization set up after the year 1933. Their duty consists exclusively in a water-sport activity. The compulsory joining of the SA was also due for the frontier protecting units, as we can see from the collection of affidavits. Here we see that we are dealing with a part of the SA which belonged to it only formally and for other than usual reasons. I may underline that it was a matter of joining the frontier protecting units, set up in the fall of 1931 under Bruening and Severin, which was compulsorily incorporated into the SA in the fall of 1933. I may also point out that the duties of the so-called Reich Board of Guardians for Youth Educations founded in 1932 went over to the sphere of the SA. In this Reich Board of Guardians for Youth Education there was a Chief of the Training Section, who is also found in the SA. To his sphere belong the so-called AA tasks, the so-called frontier protection tasks. These AA- tasks are mentioned in a document of the Prosecution. Thus, absolute evidence is furnished of the incorporation of the frontier protecting stormtroops into the SA in 1933.

I have offered inmy document book under SA document 218 an order of the Supreme SA-Leader of 7 October 1933. It shows that the Reich Minister of the Interior decreed with Law Br. I. A 5400/26.9. of 3 October 1933 that the emergency engineer service of the Technical Emergency Servide was to be transferred to the SA.

The transferred emergency engineer units supplied predominately the personnel for the SA Engineer Stormtroops. It is therefore natural for these units to be used in catastrophes as they came from the Technical emergency Service.

A predominant part of SA members who came to the SA after 1933, i.e., members of the upper classes of the Secondary Schools, official candidates and also members from industrial works and craft-trades, went into the SA not of their own free will but by reason of orders, decrees and regulations. Not even the Prosecution's subtle but not pertinent interpretation of the indictment can change that. The students, for example, served with the SA University Office after they had become members of the local SA stormtroops. All these people could not vote before 1933. The election of March 1933

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determined their evolution. They can, in no way, be made for this responsible. They were born into this time, they are the victims of this time. They are the victims of the election of March 1933, which was carried out by the older generation. They believed they served the State which was recogmized by the International World. The greaterpart of these young men were at the front. A large part sacrificed health and life for the Third Reich, which demanded every thing of them. In the belief in their duty, in the belief that they were fulfilling their tasks, they marched out. Deceived and disappointed a part of them returned home after the World War. And now they must be stamped as criminals by the indictment against the Organizations. In my collection of documents I have submitted a large number of decrees and regulations which exhibit the principle for the entry of these young people into the Organizations. I need not enumerate them separately, they are known to the Tribunal. Should these people now be punished because they fulfilled the duties and obeyed the laws, regulations, and statutes which were imposed on them? From this youth which was absorbed in these organizations came the fighters against the Nationalist-Socialist state.

I willshow you an example:

The case of Scholl, who rebelled against the compulsion by this State. This youth was born at a time when the first World War inflicted its wounds upon the European countries. This youth suffered most from the consequences of the unfortunate development which shortsighted men created in Versailles. This youth suffered because of this problem which the bulk of the German Nationa, as well as the Supreme SA leadership, always wanted to solve by peaceful means. The witness Gisevius also recognized this clearly. He stated that in theyears until 1938 no other mood could prevail among the masses of SA than in the masses of the German people. And this mood undoubtedly was that the very thought of war was a piece of insanity. He also stated that the assumption that the SA participated in war crimes must likewise be denied.

This treaty of Versailles and the chief postwar events; the blockade of the Republic and its battles against Communism; the currency inflation, the ruin of the middle classes, unemployment, civil warfare, party armies, Parliamentary chaos, laid the foundation for the young generation and for

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its development.

All of this should not be forgotten when passing judgment on the fate of the young generation within such organizations who did not vote for Hitler in 1933.

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It is deplorable that this group-structure of SA after 30 January 1933 could not be demonstrated to the High Tribunal through statistics. These statistical data are lacking because of the absence of approved witnesses. However, I can give a rather accurate record of the formations to the Tribunal which is necessary so that it may have a clear picture of the SA. This record is covered by the summary of collective declarations in lieu of oath.

As previously mentioned, the traditional SA had on 30 January 1933 300,000 member

The Stahlhelm (Steelhelmet) was incorporated upon order as follows :		
with the first batch came	550,000	"
with the second batch came	450,000	" into the SA
In line with orders the following were transferred:		
Rider's Country Clubs with	200,000	"
Watersport clubs with	50,000	"
Frontier guard units with	100,000	"
Auxiliary Engineers' units of the technical Energency Service	50,000	"
On orders were also added : Medical Aid Associations and other Red Cross Formations;		
On the strength of Government decrees: medical doctors were transferred to the SA Medical Aid Service	60,000	"
Also on orders the Kyffhaeuser Society with	1,500,000	"
Incorporated were university students and students of technical high schools, by virtue of legal decree	100,000	"
Students of technical and secondary schools -by virtue of decree of 9 September 1933 - and Religious Youth Societies by virtue of order- joined SA with	150,000	"
On orders Brigade Erhard was added with	150,000	"
Aviation sports Society Oberland and Frontbann	200,000	"

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Incorporated were civil servants, primarily men of the rising generation, by virtue of Government decree with	200,000	"
The Honorary Leaders and Z.V. Leaders (leaders for emergency class) of SA	20,000	"
Additional increases to SA	420,000	

Of the 420,000 men 200,000 came from organizations of the Left parties, e.g. Red Front and Reichsbanner.

This brings the total membership up to	4,500,000	

Withdrawals in 1934, immediately after 30 June 1934 were as follows:

Kyffhaeuser Society	1,500,000	"
NSKK (National Socialist Motor Corps)	450,000	"
SS	250,000	"
Political Leaders	150,000	"

From 1934 until the time when the number of the members had reached 1 ½ millions there resigned:

War casualties and disabled men	350,000	
As a consequences of legal proceedings	40,000	"
By transfer to other organizations	260,000	"
Thus number of members reached	1,500,000	"

Within the next few years a great change in membership took place. Part of the members dropped out by death and illness. These were replaced by the rising generation. They came mostly from the Reich-Finance-School (14 schools) with about 50,000 members, as well as from students and newcomers among the officials, who were legally bound to serve in an organization, from the Hitler Youth, whence they were transferred to the SA. The conclusion of evidence of 13 March 1946, Paragraph 6 A, Figure 2, enphasizes that it would be of importance whether the membership of the SA was generally a voluntary one or a result of a legal decree. The tenor of the speech proves clearly that there could not be a question of a voluntary membership of the SA in general, but that it is mostly a membership on the basis of an order or under legal pressure.

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The bulk of the masses were thus incorporated as such on the basis of administrative decrees or on Hitler's orders, which according to the law concerning the unity of State and Party are legal decrees or have legal character. A condemnation therefore of them as a collective organization is not possible, as there is the lack of a uniform aim.

If we picture the time after 1933, we recognize, that the third Reich was a National Police state. From the affidavits of many convicted members of the Stahlhelm, it can be seen that the attempts to resign from the SA were already, in 1933 and 1934, considered by the States Agencies as the expression of an anti-national attitude, unless the resignation was explained by very weighty reasons such as grave illness. Only health reasons were recognized. In this connection the decree SA 222 of the Reich and Prussian Minister of the Interior is characteristic, in which it says : "In every case an investigation is to be made as to the reasons for the resignation of the official from the Party. If he did this because he disapproved of the program or the political tendency, he could not remain an official. But even if this supposition is not realized, the resignation of an employee from the Party can, on account of the close relationship between Party and State, lead to the conclusion that the employee lacks the close alliance with the National-Socialist State or the necessary willingness for sacrifice."

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If we consider SA-Document 221, we read the disposition saying that it is impossible for one to leave the SA after having been sworn in on the Fuehrer as one would any other association, and only a physical disability or another employment would permit one to resign from the SA. Other reasons only leaves the one possibility: exclusion. The circular decree of the Reich and Prussian Ministry of the Interior admist in theory, although the exclusion from the Party and its organizations is designated as a severe punishment, the the possibility that the man in question, with his wife and children, might be deprived of work and bread. That this regulation has already been effectively practiced before appears from a judgment of the provincial labor tribunal, of Bielefeld to the effect that in case of exclusion from the SA, the employer was not authorized to continue to give work. (SA-Document 220). It is not surprising that in the National Socialist State regulations were carried out before they were put into force.

In the official commentary of PFUNDTNER-NEUBERT it is said concerning the decree of 28 February 1939:

"This sort of legal new order corresponds to the principles of National Socialist State leadership. It is not like the procedure of the system state which first issued high-sounding laws, but could not execute them because the presuppositions hereto were lacking; aside from the fact that the goverment organs were too weak to do so. But the government of the Third Reich first created the positive necessary circumstances for the execution of a government measure and then issues the corresponding law".

Moreover, may I refer to the affidavits 1, 2, 3, 4 of the Stahlhelm, to the testimony of the witness Hauffe, v. Valdenfels, as well as the affidavits of the SA Nos. 61 and 81 which stress the impossibility of leaving.

Leaving the organization on other grunds than those of health meant exclusion. The consequences of this exclusion were, in addition to an automatic police supervision; endangering or losing one's economic position or profession, especially in the case of officials and employees, or the economic boycott and the danger of imprisonment on account of political unreliability. So-called political reliability was the indespensable assumtion for every

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profession which was obtainable only within the organization and from which the administration was not inclined to depart with regard to alleged or actually existing professional confirmation or family relations. Political reliability was demanded by the Third Reich. Therefore, it demanded by regulations, servic in the organization. If one excluded oneself, then it meant that which was written in the affidavit No. 81:

"It was know in wide circles that a refusal to obey regulations of the state and of the Party led to the supervision of one's activity since it meant excluding oneself from the service for the racial community.

Moreover there was no reason to refuse to work for the national community as criminal aims, methods and activities of any kind were unknown. This appe clearly from the collection of 17,000 deposition in lieu of oath. Moreover the retaining of membership by enrolled persons on the basis of an order or legal coercion cannot constitute a legal charge if their compulsory enrolment has been proved. To summarize finally once more, I can say

1. It has been proved that when illegal actions occurred, these acts were committed only by individuals and therefore the organization cannot be charged therewith;
2. that the SA Leadership did neither order nor suffer these violations, and therefore is not guilty;
3. that these excesses are in no way to be traced back to a criminal education or even a conspiracy with criminal aims.

Truth and Justice demand that an organization of millions, or its leadership, should not be declared criminal on account of these violations by individual members of the organization, after it has been established that the leadership at no time aimed at criminal actions, and the bulk of the members of the organization never committed criminal acts.

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The fact that several of the principal defendants were honorary leaders of the SA in no way alters, the evidence presented in regard to the SA. When Hermann Goering headed the SA for a short time it had only a few thousand men. At that time it was nothing but the Reichsbanner for the SPD.

The Leader Corps of the SA was composed neither of ruffians nor political wreckage. A few leaders -- five altogether -- who had not proved satisfactory, were eliminated in the events of 30 June 1934. This is the only criticism which can be leveled against Roehm, the Chief of Staff at that time, who though in his political actions strove for order and authority did not get rid of them in due time -- thereby playing into the hands of his opponents. In this, four percent of the High Leader Corps are involved; still a small fraction which never could justify condemnations. Among the salaried Obergruppenfuehrers and Gruppenfuehrers of the period from 1934 to 1945 there was not one who had been previously convicted. This was a requirement which the Supreme SA Leadership had to demand of its members because of the regulation that the ordinary SA member's admission was contingent upon a police certificate. None of them was a so-called ruined career. They all had been trained for a definite profession, with good possibilities for advancement, before they took steps to enter as a salaried member into the Leadership Corps of the SA.

That the political purpose of the SA was based on patriotism alone has been conclusively shown by the evidence. Roehm did everything to strengthen the communal ideas of the German people. His aim was to increase the confidence already won. He waged war on the excesses during the political revolution. He wished to win over the trade unions, not to destroy them. Lutze, in himself a weak personality, repeatedly challenged incidents and measures of the Party. He opposed the party leadership. In an affidavit we submitted in evidence, it is stated that he condemned the so-called Nazism of the NSDAP. This is also the chief explanation of his well-known uncompromising opposition to Himmler and Bormann. There was hardly a question which he, as SA Chief of Staff, agreed with the two men. This applies especially to the question of the Herrenrasse and the attitude towards the

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Jews; to the Church question and also to the attitude towards political opponents.

If the Tribunal is looking objectively for the men guilty of the unspeakable disaster, which has befallen the whole world, then they might proceed from the individual point of view. This standpoint we also find in a speech of Pope Pius XII, which he made on 20 February 1946: "Erroneous conceptions are circulating in the world which declare a man guilty and responsible solely because he was a member of or belonged to a community, without trying to examine or to investigate whether there really exists a personaly responsibility for such acts of commission or omission.

That implies the arrogation of the rights of God, the Creator and Redeemer, who, in the mysterious planning of His always loving Providence, is solely the absolute Master of event , and as such, when He thus decides in His eternal wisdom, links up the fates of guilty and innocent, responsible and irresponsible persons.

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DR. FELCKMANN: May I call the attention of the Court for a few minutes. In my plea on Monday I omitted important statements concerning Germanization, the Einsatzgruppen, the concentration camps, and mass exterminations, etc. Instead of that I referred to my written plea. The Presider repeatedly stated that the Court would study these written statements of all the defense counsel. Yesterday --

MR. PRESIDENT: When did they receive them. I say, we will start with them when we receive the statements; we have not asyet received them.

DR. FELCKMANN: I was about to say. Today I learned through the General Secretary, and the translation section that the English translation will not be prepared for the President, or the Tribunal; whether there is a Russian or French translation for the Judges, I do not know. My plea without the parts I omitted, and, particularly without the appendix, which I often quoted and I repeatedly mentioned in my plea, is incomplete and can not be understood. I therefore hand the Tribunal a complete copy of my plea with the appendix in German, and ask respectively for a translation.

MR. PRESIDENT: That will be done in every case. Dr. Gawlik?

DR. GAWLIK: I shall accept and I ask permissionto submit a complet copy of my plea for translation as they are submitted.

MR. PRESIDENT: Yes, that will be done. Would the Prosecution like to begin today?

SIR DAVID MAXWELL FYFE: May it please the Tribunal.

ORGANIZATIONS

In 1938 Hitler spoke in the Reichstag:

> "National Socialism has given the German people that leadership which as a party not only mobilizes the nation but also organizes it. National Socialism possesses Germany entirely and completely ..... There is no institution in this State which is not National Socialist."

We know now the kind of leadership that National Socialism did give the German people. We know how and for what purposes the Nazi Party mobilized and organized the German nation - for world dominion at the cost of war and murder. The entire and completepossession of Germany by National Socialism meant the possession of the people, body and suul, by the organizations of the National Socialist Party and Government.

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For what purpose were the Nazis seeking this possession of the people? Their aims were to have a controlled but fanatical police state geared for military aggression. If one imagines an "ersatz" Machiavelli presenting what this required, he well might have considered necessary:

1) A quick method of registering your laws and decrees. For this you need a pliant and complacent cabinet with full legislative powers - the Reichsregierung.

2) Quick suppression of any signs of opposition or freedom of thought. Here you want an espionage service and a police which will strike at once - the SD and the Gestapo.

3) A complete check and control of public opinion. This is provided by the pressure of a fanatical Corps of Political Leaders on a propaganda-soaked public.

4) A Praetorian Guard who will rid you not only of any "turbulent priest" but of any person with a creed of their own, and so you have the SS.

5) A spreading executive hand which will grasp the population in its clutch of physical training and mental preparation for war; which will thrust that population forward and downward when general violence is necessary; which will hold it firm in the ideologies of terror at home and abroad. What could be more suitable than the SA who had just won "the battle of the street

6) An instrument to turn your existing military forces to your purposes; to make them ready to commit any act even if it is contrary to military tradition and repugnant to soldier-like qualities; to give unquestining assent to the enslavement of other nations; to co-operate and hold the ring for the agencies of oppression to destroy national life and the dignity of the human spirit. This was the function which the General Staff and High Command must perform.

Speed of government, delation, absence of free thought and speech, internal suppression, external trained and calculated force. These are the eternal interlocked weapons without which tyranny cannot flourish. These are

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but other names for the Organizations which we have indicted as criminal and by which these defendants and their colleagues were able to lead and organize and possess a nation.

When Mr. Justice Jackson addressed this Tribunal on 28 February he emphasized that it was not our purpose to convict the whole Germnn people of crime. I say again that we do not seek to convict the people of Germany. Our purpose now is to protect them and to give them opportunity to rehabilitate themselvesin the esteem and friendship of the world. But how can this be done if we leave amongst them unpunished and uncomdemned those elements of Nazidom which were most responsible for the Nazi tyranny and crime and which, as this Tribunal may well believe, are beyond conversion to the ways of freedom and righteousness?

Nor is it only the German people that we seek to protect. All Europe needs protection. Consider the position of Europe today. Among the Germans who were Hitler's there are many thousands of men and women who with their own hands have done murder - murder not, perhaps of a single person, but of many. Hundreds of thousands, nay, millions more, became disciples of their Fuehrer's creed of hate and cruelty. Amongst them are those whose profession and training was to command and lead, militarily and politically, men who are still as fanatical and ruthless in their lust for power as at any time during the last 25 years. You remember the words:

> "Fight? Why do you always talk of fighting. You have conquered the State and if something does not please you then just make a law and regulate it differently! Why must you always talk of fighting? For you have every power! Over what do you fight? Outer-politically? You have the Wehrmacht - it willwage the fight if it is required. Inner-politically? You have the law and the police which can change everything which does not agree with you. We do not mean the fitht of all against all. We do not fight against the other, but we fight because of the other."

Such were the precepts of Hoheitstrager - bearers of National Socialist sovereignty. They are not forgotten in a day.

Should these men be let loose amongst the German people and amongst the people of Europe? Already the difficulties of this unhappy continent are overwhelming. Apart ffom those who come within the definition of these

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Organizations, vast numbers of fanatical adherents of Nazidom must in any event remain at large. We have a whole generation of the German people who kno no other ways than those prescribed for them by their Nazi rulers - young men and women whose first lessons were taught by Nazi teachers, whose education was had in Nazis schools, and

whose sport and recreation were found in the military exercises of the SA. Are the leaders of Nazi Germany - in the shape of the members of these Organizations - to be let loose to work their influence upon such fertile ground?

The law is a living thing. It is not rigid and unalterable. Its purpose is to serve mankind and it must grow and change to meet the changing needs of society. The needs of Europe today have no parallel in history. Never before has the society of Europe faced the problem or the danger of having in their midst millions of ruthless, fanatical men, trained and educated in murder and racial hatred - and in war. It is a situation which, were there or were there not precedents from the past, would justify and indeed compel unusual legal provision. In fact, as the Tribunal will remember from the speech of Mr. Justice Jackson, there are ample precedents for the procedure which we are asking you to institute. If you are satisfied that these Organizations as a whole are criminal, that the great majority of the members of these Organizations knowingly and voluntarily supported the criminal policies, and participated in the criminal activities of the leaders of the Nazi Party, then it is your duty under the Charter to declare them criminal. You may well think that your duty under the Charter is only commensurate with your duty to Germany, to Europe and the World.

The principle on which their condemnation is asked for is clear. It is a practical application of the sound theory of punishment which we learnt in our youth - from, among others, that great German thinker, Kant. If men use society merely as a means to their own ends, then society is justified in putting them outside society. The immensity of the problem does not excuse its non-solution. The failure to perform this legal duty may well spell terror and racial persecution throughout a continent and for the third time in our adult lives, world war.

The Court and the Prosecution have had the advantage of reading what is, if you will allow me to say so, a careful and learned

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argument from Dr. Klefisch. The criticism, however, which I should venture to make is that it is remote from the essential fact-finding function of this stage of the trial. The first 30 pages are in reality an attack on Articles 9 and 10 of the Charter, and the conclusion which is drawn that the Tribunal should use the word 'may' in Article 9 as a basis for saying on purely a priori reasoning that no Organization can be criminal is, in our submission, to make nonsense of Articles 9 and 10, and to fly in the face of their connotation as well as their intendment.

In the succeeding parts of the argument Dr. Klefisch makes certain particular submissions to which attention might be drawn.

The question is posed by him to what extent in number, how and by whom must crimes be committed in order to be imputed to the Organization? To this we say that the practical answer presents no difficulties. No one can lay down categorically how many grains make a heap, but equally, no one can deny that he knows a heap when he sees one. Again, it is easy to decide and sensible grounds what crimes are within the general aims of the organization. The Prosecution not only accept but adopt the proposition that in the case of each organization certain crimes can be said to be typical and repetitive, and they draw attention to the number of such typical and repetitive crimes which occur in the evidence.

Similarly, no difficulty is found in the words " in connection with an individual defendant." To say that if an individual defendant committed his crime in a capacity other than that of a member of the organization, Article 9 is not complied with, is to view this case in a non-existent vacuum. It is the whole burden of the prosecution's case that individuals and organizations are so interlocked that the common end of internal and external domination is omnipresent.

Equally, we strongly contest the suggestion that a number of members were not aware of the criminal purpose of the organizations. Let us once and for all tear aside the artificial suggestion that large sections of the adherents to the Nazi Party were going about

in blinkers. It is a travesty of the facts and and insult to their intelligence.

We agree with Dr. Klefisch that non-participation in crimes under Article 6 of the Charter and a lack of will to support the policies and activities of the organization are the preconditions of innocence. It is the basis of our whole submission that, to use Dr. Klefisch's own words, "The members did subordinate and work continually for the aims of the organizations and the Nazis."

THE PRESIDENT: Would be convenient to break off there or do you want to go on a little further?

(The Tribunal adjourned until 29 August 1946, at 1000 hours.)